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Supreme Court, U.S.
FILED
DEC 31 1987
JOSEPH F. SPANIOL, JR.

No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BOB MOZERT, *et al.*,

Petitioners,

v.

HAWKINS COUNTY PUBLIC SCHOOLS, *et al.*

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

Fourteen children were suspended from their public schools, or were otherwise disciplined, for refusing to read textbooks that violate their religious beliefs.

1. Does coercing children to read textbooks which violate their religious beliefs burden their free exercise of religion?

2. Is home instruction, under Tennessee law, for the single subject in dispute, a less restrictive alternative than expulsion of religious objectors from the public schools?

3. Are damages available under 42 U.S.C. § 1983 to reimburse parents for providing alternative education when their children are wrongfully excluded from the public schools, even when some of the costs are for private religious education?

PARTIES

Bob Mozert, Alice Mozert, their children, Travis Mozert and Sundee Mozert, Roger Frost, Vicki Frost, their children, Marty Frost, Rebecca Frost, and Leisha Frost, John Couch, Sandra Couch, and their children Wayne Couch and Vickie Couch, Farley Meade, Christine Meade, and their children Angela Meade and James Meade, James Baker, Rachel Baker, and their children, Vicky Baker and Heather Baker, Ernest Whitaker, Jan Whitaker, and their child, Steve Whitaker, Jimmy Eaton, Virginia Sue Eaton, and their children, James Bradley Eaton and Rebecca Eaton, are the petitioners herein. They were the plaintiffs in the district court and the appellees in the court of appeals.

Hawkins County Public Schools, Doug Cloud, Conley E. Bailey, Larry Elkins, Harold E. Silvers, Jr., Jean Price, Quentin Dykes and James Salley, were the defendants in the district court and appellants in the court of appeals. Tennessee Commissioner of Education, Robert L. McElrath, was an intervening defendant in the district court and an appellant in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on August 24, 1987.

OPINIONS BELOW

The most recent opinion of the Sixth Circuit in this matter is published at 827 F.2d 1058. It appears in the appendix beginning at 1a. The decision of the district court on the merits of the case is found at 647 F.Supp. 1194. It appears in the appendix beginning at 55a. The decision of the district court on damages is unpublished and is found in the appendix beginning at 49a. The prior

opinion of the Sixth Circuit, which remanded the case for trial, is found at 765 F.2d 75. It begins in the appendix at 75a. The initial decisions of the district court are found at 579 F.Supp. 1051 and 582 F.Supp. 201. They begin in the appendix at 83a and 87a respectively.

JURISDICTION OF THIS COURT

Petitioners respectfully show the following as the grounds upon which the jurisdiction of this Court is invoked:

(i) This case seeks review of a decision of the United States Court of Appeals for the Sixth Circuit entered on August 24, 1987. This is a civil case.

(ii) An order denying petitioners' timely request for rehearing en banc was entered on October 5, 1987.

(iii) Jurisdiction for review of this matter by certiorari is conferred on this Court by 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following constitutional and statutory provisions:

First Amendment to the Constitution of the United States

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

Fourteenth Amendment to the Constitution of the United States

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF FACTS

This is the widely publicized dispute over textbooks arising in Hawkins County, Tennessee. In late August, 1983, Vicki Frost, Bob Mozert and the other petitioner parents became concerned about some of the stories their children were reading from the Holt, Rinehart and Winston readers (1983 edition). The Holt readers were being used for the first time in the Hawkins County schools that fall in grades one through eight.

These basal readers were used for elementary and middle school reading courses and consisted of a series of texts containing approximately 600 stories, poems, etc. The complaints of the parents at all stages have focused on the books in grades two through eight. The first grade books have never been at issue.

The parents all share conservative, evangelical Christian beliefs, although they attend various churches. The parents complained to school officials that the Holt reading books taught more than mere reading skills, conveying with implicit or explicit approval various ideological and religious themes the parents found violated their religious beliefs. The parents identified numerous themes as contrary to their religious beliefs, such as occultism, secular humanism, evolution, disobedience to

parents, pacifism, and feminism [1]. It is stipulated that the parents' religious beliefs concerning the books are sincere. It is further stipulated that those religious beliefs would be offended if the students were required to read the Holt texts.

The seven plaintiff families had fourteen children in grades in which the Holt readers were in use at the time the controversy began in 1983.[2] Eight of the children were enrolled in three different elementary schools. The six middle school students all attended Church Hill Middle School.

Within a period of a few weeks, all of the parents made requests of the principals of the various schools to excuse

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[1] There has been a tendency by the defendants to use discussion of the "specifics" of the plaintiffs' objections as a method to engage in a type of "sophisticated" ridicule of the plaintiffs' beliefs. This has been particularly true in the media reporting of the case. Some of the most oft-repeated charges, from the ABC Evening News to *USA Today* are that the parents object to stories like "The Three Little Pigs" and "Goldilocks and the Three Bears." These stories appear in the first grade readers. Again the parents never objected to the first grade readers. The parents are often subjected to thinly veiled ridicule by the defendants for objecting to a single passage in a piece which calls itself *The Diary of Anne Frank*. In actuality this piece is a total rewrite from the original work. The specific passage designated by the parents as offensive to their religion cannot be found in the original book *Anne Frank: The Diary of a Young Girl*. Moreover, the parents find it extremely interesting to note that Anne Frank recorded in her book that her own parents and the parents of her friends screened their reading material. The parents would not let them read material which they found objectionable. See Washington Square Press Edition, (1972), pp. 23, 160.

[2] Subsequently, three more children from these families attained the age to be enrolled in the grades in question and were added as plaintiffs in due course.

their children from classes using the objectionable Holt readers. The parents also requested an alternative reading program and proposed several alternatives. The parents made it clear that they would either pay for a reading tutor for their children, teach reading to the children themselves, or accept a program whereby the children received an alternative text from their regular teacher.

During the fall of 1983, the principal of Church Hill Middle School, James Salley, allowed students to opt out of the Holt readers and use an alternative text provided by the school and administered by the children's regular teachers. Seven students participated.[3] These seven students received assignments from another reading book, and did their assignments either in the library or a room next to the classroom. These students received grades for their work, and their parents were satisfied with their progress. No complaints about this alternative were ever registered by any teacher or principal who was working with the program. The opt-out program lasted approximately six weeks.

Two students at two different elementary schools also participated in opt-out programs. The principal of the third elementary school denied a request for an alternative reader, and ordered the family to pick up and permanently remove their two daughters who attended there. The youngest daughter was in first grade, and thus was not yet using an objectionable Holt reader, but she was asked to leave the school like her second grade sister, because, the principal said, she would be reading the book the next year, and so she should leave now, in anticipation

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[3] These included the six plaintiff-children who were in middle school and another girl who is no longer a plaintiff.

of future conflict. The children were removed as the principal demanded.

On November 10, 1983, the Hawkins County School Board unanimously passed a resolution which eliminated all alternative reading programs, and compelled the reading of the Holt books exclusively. Previously, at the September and October, 1983, school board meetings, the parents had appeared and voiced their complaints about the Holt books to the school board members. The parents also presented their requests for alternatives. The parents never requested the removal of the controversial books. Rather, their request focused solely on providing an alternative for their own children.

The school board members never attempted to find out how the alternative plan was working before discontinuing the accommodations which had been amicably arranged by the parents and particularly the middle school principal. Only one school board member said he talked to anyone about the alternative program, but he could not recall to whom he had spoken, nor what had been discussed.

The school board refused to allow any alternative reading arrangement as suggested by the parents. It specifically rejected the proposal that the parents hire a tutor. The board did not examine any other alternative. This was the only incident in the school district's history where parents had raised objections to textbooks and no policy of any kind existed on handling objections prior to the school board vote.

After the school district voted to eliminate all alternative reading programs, it began rigorously requiring all students to read the Holt books. In November, 1983, the school district suspended for three days the seven middle

school students who would not read the Holt readers due to their religious beliefs. On November 22, 1983, the same seven students were suspended for an additional ten days due to their refusal to read the Holt books. On December 8, 1983, two students were suspended for a third time, for ten days. This third suspension only involved two students since by this time, many of the other students who had been suspended began attending neighboring public schools (as tuition-paying students) or private schools.

One student, Steve Whitaker, continued in the Hawkins County Public Schools, although his parents objected on religious grounds to his reading of the Holt books. His parents could not afford to send him to a private school.

The attitudes of the school officials with respect to providing an accommodation for the religious beliefs of the plaintiffs can best be demonstrated by a few of the incidents surrounding this controversy which are contained in this record.

School officials had one mother, Vicki Frost, arrested on November 23, 1983, when she went to Church Hill Elementary School to remove her daughter from the reading class using the Holt books and teach her reading in some alternate place. Mrs. Frost was arrested for being unlawfully on school grounds. A state judge later dismissed the criminal charges against Mrs. Frost. In a separate civil rights case, a federal district court jury awarded her $70,000 against the school board for violation of her constitutional rights. That verdict is now on appeal to the Sixth Circuit Court of Appeals.

Harold Silvers, chairman of the Hawkins County School Board, said later that he thought the school district should have taken stronger action against the fam-

ilies requesting alternative readers. "If we had taken a hard-nosed attitude to begin with, I mean a really hard-nosed attitude, it wouldn't have gone this far," Silvers said. Silvers did admit, however, that if the school used books which violated *his* religious beliefs, he would "scream like a panther."

Bill Snodgrass, the Hawkins County Public School Superintendent at that time, said it was better for children to be forced to read materials to which they objected, than to give them an alternative book, because "after a while, they would quit kicking and screaming." Superintendent Snodgrass said he believed that forcing the children to read material that violated their religious beliefs would build character and develop self-discipline.

A local juvenile judge, Reese Gibson, sided with the school district. He publicly threatened to have the children arrested who objected to reading the Holt books.

State Commissioner of Education Robert McElrath, an intervening defendant, testified that he would back a school district which enacted a policy of mandatory ROTC for high school graduation and forced children with sincerely held religious beliefs of pacifism to attend. He also testified that he would force children with sincere religious objections to participate in co-ed physical education classes. He testified that he would also support a district which forced black children to read books which their parents deemed racist in character, even if the parents asked to opt out.

Although the school board voted on November 10, 1983, to prohibit alternative reading programs, the alternatives quietly continued for two students who had been suspended earlier for their religiously-based refusal to read the Holt books. Steve Whitaker did not have to read the

Holt books for the first month he was back at school (December, 1983). Later, his teacher required Steve to read the Holt books, but she made notes on the worksheets that said, "don't believe what's in the contents of this story," or, "these stories are not true."

Gina Marshall returned to the Hawkins County schools after she had been suspended for religiously-based refusals to read the Holt books. During the remainder of the school year, she did not read the Holt books, but used a workbook connected with the reading book. Gina's teacher put an "X" through the portions of the workbook that dealt with stories from the Holt books.

STATEMENT OF PROCEEDINGS

On December 2, 1983, the plaintiffs filed a civil rights action under 42 U.S.C. § 1983 against the school district, the board members, the superintendent and the building principals in the United States District Court for the Eastern District of Tennessee, for violation of their Free Exercise of Religion rights and their parental liberties guaranteed under the United States Constitution. The families asked for declaratory and injunctive relief, allowing them to opt out of reading class, and receive alternative instruction for damages against the defendants. Federal question jurisdiction was predicated on 28 U.S.C. § 1343 (3) and (4), since the complaint alleged violation of federal civil rights.

A motion for preliminary injunction was denied on December 9, 1983.

On February 24, 1984, U.S. District Judge Thomas Hull dismissed all but one of the plaintiffs' claims. On March 15, 1984, Judge Hull dismissed the remaining claim, saying that although the Holt readers taught

themes which violated the plaintiffs' beliefs, the constitutional rights of the plaintiff-families were not violated, since the children were not coerced to believe what they read. The families appealed the dismissal of their lawsuit to the United States Court of Appeals for the Sixth Circuit.

The Sixth Circuit reversed and remanded on June 18, 1985. That court said that Judge Hull consulted materials outside the pleadings and transformed the defendants' motion to dismiss into a motion for summary judgment. The Sixth Circuit found that factual issues existed which precluded the granting of summary judgment.

Both sides conducted extensive discovery during the remainder of 1985 and the first part of 1986. During this time, the Tennessee Commissioner of Education was allowed to intervene in the lawsuit. Judge Hull conducted an eight-day trial beginning on July 14, 1986. The trial was substantially shortened by a process of stipulations and by the designations of large portions of depositions of the parties in lieu of live testimony.

Judge Hull issued a decision in favor of the plaintiff-families on October 24, 1986. In his decision, Judge Hull ruled that the school district's actions in coercing the children to read books which violated their religious faith burdened the families' Free Exercise rights. Judge Hull also ruled that the school district did not use the least restrictive means to accomplish its compelling state interest of educating children and promoting the literacy of its citizens. He found that allowing the students to attend the balance of the school day in the public schools while permitting the parents to teach their children in the subject of reading under the Tennessee home schooling law would provide an alternative which would accommodate the

religious beliefs of the plaintiffs without material disruption of the educational program of the school district.

Judge Hull granted injunctive relief to the plaintiff-families. He ruled that the children were to be exempted from classes using the Holt readers and that the children would learn reading under the parameters of Tennessee's home school statute (T.C.A. § 49-6-3050). Judge Hull chose this alternative over others suggested by the parents because of potential Establishment Clause concerns he felt might arise in the working of the other alternatives.[4]

On the issue of damages, Judge Hull found that all of the individual defendants had good faith immunity and dismissed them from the lawsuit. He allowed the damage claim to remain against the school district, and made an award of approximately $51,000, primarily for the costs of providing alternative education to the seven plaintiff-families on December 18, 1986.

The defendants appealed. A three-judge panel reversed the district court on August 24, 1987. In an opinion joined by one other judge, Chief Judge Lively ruled that the families' rights under the Free Exercise Clause were not burdened. The court held that the school district did not burden the exercise of the plaintiffs' free exercise rights. The linchpin of the court of appeals' holding was its view that there was no coercion since the children were not required to believe what they read. Judge Cornelia Kennedy concurred in the opinion of the court and filed her own opinion discussing the compelling

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[4] The parents did not cross-appeal the denial of their other alternatives to the court of appeals. Therefore, these other alternatives were not before the appellate court or this Court, since the plaintiffs are content with the relief granted by the district court.

state interest doctrine. Judge Boggs disagreed with the court's opinion but concurred in the result because he believed that if the reasoning of this Court in cases like *Sherbert* v. *Verner*, 374 U.S. 398 (1963) and *Thomas* v. *Review Board*, 450 U.S. 707 (1981) were to be applied to public education, it would require a decision of the United States Supreme Court. He specifically noted that under the majority opinion, absent an Establishment Clause violation, a student could be coerced to read religiously objectionable material. Thus, under this theory, the Free Exercise Clause provides no additional protection in the context of public education.

On October 5, 1987, the Sixth Circuit Court of Appeals denied plaintiffs' motion for rehearing en banc.

REASONS FOR GRANTING THE PETITION

I.

This Case Presents Questions Of Extraordinary Import Which Need To Be Settled By This Court

This case presents a classic confrontation between parents and public school officials over the education of children. Each side believes that it is playing for stakes that are absolutely vital to its respective interests. The plaintiffs believe that the right of religious parents to have their children remain in the public schools will be lost if schools can coerce religious objectors to abandon any hope of accommodation. The defendants believe that the public schools will be fragmented by religious divisiveness if the plaintiffs prevail.

This case has been perceived by the parties, by the *amici*, by the lower courts, and by the press as one of extraordinary importance, warranting the attention of the nation to its issues and result. Since this case leapt

into the national spotlight in the summer of 1986, when it was tried in the district court, substantial public and legal inquiry has been focused on the key issue which it presents: Should children be forced to read books which they find religiously offensive as a condition of remaining in the public schools?

Not every case which receives intense public attention warrants Supreme Court review. Famous personalities, sordid facts, and extraordinary jury verdicts, often find their way into court, but such cases rarely present constitutional issues of the sort which merit serious attention by this Court. This case is of a different class. It presents issues of great public importance in a clear-cut constitutional context.

Petitioners respectfully suggest that this Court should provide the litigants and the nation with authoritative answers to the questions presented in this case.

The Free Exercise Clause tests enunciated by this Court in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), provide the framework for these issues. Since the issue of sincerity of the plaintiffs' religious beliefs has been stipulated, the first area of inquiry is the burden test. The parents and students have contended that the burden on their religious beliefs is self-evident. Their children were kicked out of the public schools for refusing to read textbooks in obedience to their own religious beliefs and those of their parents.

In the district court, the defendants contended that the plaintiffs did not satisfy the "burden" requirement since the religious beliefs which were offended in the textbooks were not "central" to their religions. The district court rejected this analysis citing this Court in *Thomas* v. *Review Board*, 450 U.S. 707 (1981), for its holding that

plaintiffs must demonstrate that their beliefs are rooted in religion.[5] It rejected the theory of the defendants which asked the court to weigh the importance of the plaintiffs' various religious beliefs. This argument was again pressed by the defendants in the court of appeals.

However, the court of appeals did not accept this approach. It took the rather extraordinary view that unless children are coerced to believe what they read, the Free Exercise Clause provides no protection to a student in the public school who is forced to read religiously offensive material. As Judge Boggs in his concurrence correctly points out, under this theory if a public school decides to teach a mandatory "New Testament" as literature class, it can expel Jewish students who refuse to participate in such a course. 827 F.2d at 1080.

The opinion of the court of appeals reduces the protection of the Free Exercise Clause to a shield against overt attempts at brainwashing. Surely the freedom of conscience embodied in the First Amendment provides protection at some point before induction into government programs aimed at coerced belief.

This Court has repeatedly recognized that activities in the public schools which invade the area of religion are constitutionally suspect, even if mere suggestions of government approval of religious views are communicated. In *Edwards* v. *Aguillard*, 482 U.S.____, 107 S.Ct. 2573, 96

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[5] Legal commentators have supported Judge Hull's decision and his application of the Free Exercise Clause in this case. See, "Court-ordered Exemptions to Secure Religious Liberty," 21 U. Richmond L. Rev. 335-89, Winter 1987; and "Appealing to a Higher Law: Conservative Christian Legal Action Groups Bring Suits to Challenge Public School Curricula and Reading Materials, 18 Rutgers Law Journal 437-62, Winter 1987.

L.Ed. 2d 510 (1987), this Court noted the psychological pressure on young children in the public schools.

> Students in such institutions are impressionable, and their attendance is involuntary. [Citations omitted]. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students emulation of teachers as role models and the children's susceptibility to peer pressure.

96 L.Ed. 2d at 519.

This Court has held that children are too impressionable to be told at the beginning of a school day that a moment of silence might be used for prayer. *Wallace* v. *Jaffree*, 472 U.S. 38 (1985). Accordingly, plaintiffs believe they stand on solid constitutional ground when they argue that their children are too impressionable to be subjected to seven years of lessons in materials which the defendants admit offend these families religious beliefs.

The fact that these other cases have involved the Establishment Clause and this is a Free Exercise case provides no valid basis for distinction. The psychological pressure placed upon a young child in the public schools to conform to the accepted beliefs announced by school officials does not recognize neat dichotomies between the Free Exercise Clause and the Establishment Clause.

The court of appeals did not consider, in the majority opinion, the issues which the district court found to be of greater significance. First is the issue of the nature of the state's interest. The plaintiffs have always conceded that the operation of the public schools constitutes a compelling state interest within the meaning of this Court's decisions. However, the district court correctly agreed with plaintiffs that the real issue is whether or not the state has

a compelling state interest in the exclusive use of a single textbook for the teaching of reading. The district court found that it did not. Amplifying this decision, the district court found that there was an alternative available to the school district which would accommodate plaintiffs' religious beliefs and would not materially disrupt the operation of the public schools.

The defendants argued that the state had a compelling state interest in the operation of the public schools which would be destroyed if the relief granted by the district court were to stand. The trial court correctly pointed to the successful and non-divisive operation of the alternative reading program in the middle school for several weeks as the best evidence that these fears were unjustified.

More alarming to the plaintiffs was the argument of the defendants that the state possesses an absolute right to inculcate values of its choosing as the price of attendance in the public schools. Plaintiffs concede that the state possesses the right to inculcate values within a certain range. However, this right does not include the power to coerce participation by persons possessing sincerely opposed religious beliefs. The most curious and dangerous argument advanced by the defendants is the contention that they have the right to inculcate the virtue of tolerance of religion. Plaintiffs contend that these books inculcate religious syncretism, a view that all religions are equal in terms of their religious truth. Plaintiffs accept, and in fact are demanding in this very litigation, civil toleration of religion. Civil toleration is, we would submit, a view that persons of all religions should have equal standing in their dealings with the government and in related public affairs. The district court perhaps made the most cogent analysis about tolerance when it said:

> Moreover, such an accommodation might promote a spirit of religious tolerance in the school system and impress upon the student body the high regard this society has for religious freedom.

647 F. Supp. at 1247.

The court of appeals also did not reach the issue of the workability of the district court's remedy. The district court permitted part-time home schooling in the subject of reading so long as it would otherwise comply with the Tennessee home schooling statute, Tenn. Code Ann. § 49-6-3050. This raises an important issue arising under the least restrictive means test. Plaintiffs contend that the evidence which convinced the district court that this program would be able to meet the state's objectives was more than sufficient. At the same time it would allow the parents and children the right to remain in the public schools for all of the remaining courses, thus accommodating their dictates of their faith.

Finally, the Establishment Clause issues raised by the award of damages for the wrongful exclusion of the plaintiff children from the public schools are also substantial. Like the State in *Witters* v. *Washington Department of Services for the Blind*, 474 U.S.____, 106 S.Ct. 745, 88 L.Ed. 2d 846 (1986), the defendants contend that funding any religious education for these plaintiffs violates the Establishment Clause. The district court relied on this Court's decision in *Witters* in reaching its holding that the Establishment Clause did not prohibit the reimbursement of these plaintiffs because the damages award was generally available to all litigants. Specifically, the Mozert children were enrolled in a neighboring public school district for which they paid tuition. The other plaintiff children who were enrolled in religious schools were entitled to neither greater nor lesser reimbursement than the

ideas presented, and to understand complex characters that appear in reading material. Plaintiffs do not dispute that critical reading is an essential skill which their children must develop in order to succeed in other subjects and to function as effective participants in modern society. Nor do the defendants dispute the fact that any reading book will do more than teach a child how to read, since reading is instrumental in a child's total development as an educated person.

The plaintiff Vicki Frost is the mother of four children, three of whom were students in Hawkins County public schools in 1983. At the beginning of the 1983-84 school year Mrs. Frost read a story in a daughter's sixth grade reader that involved mental telepathy. Mrs. Frost, who describes herself as a "born again Christian," has a religious objection to any teaching about mental telepathy. Reading further, she found additional themes in the reader to which she had religious objections. After discussing her objections with other parents, Mrs. Frost talked with the principal of Church Hill Middle School and obtained an agreement for an alternative reading program for students whose parents objected to the assigned Holt reader. The students who elected the alternative program left their classrooms during the reading sessions and worked on assignments from an older textbook series in available office or library areas. Other students in two elementary schools were excused from reading the Holt books.

B.

In November 1983 the Hawkins County School Board voted unanimously to eliminate all alternative reading programs and require every student in the public schools to attend classes using the Holt series. Thereafter the plaintiff students refused to read the Holt series or attend reading classes where the series was being used. The children of several of the plaintiffs were suspended for brief periods for this refusal. Most of the plaintiff students were ultimately taught at home, or attended religious schools, or transferred to public schools outside Hawkins County. One student returned to school because his

family was unable to afford alternate schooling. Even after the board's order, two students were allowed some accommodation, in that the teacher either excused them from reading the Holt stories, or specifically noted on worksheets that the student was not required to believe the stories.

On December 2, 1983, the plaintiffs, consisting of seven families—14 parents and 17 children—filed this action pursuant to 42 U.S.C. § 1983. In their complaint the plaintiffs asserted that they have sincere religious beliefs which are contrary to the values taught or inculcated by the reading textbooks and that it is a violation of the religious beliefs and convictions of the plaintiff students to be required to read the books and a violation of the religious beliefs of the plaintiff parents to permit their children to read the books. The plaintiffs sought to hold the defendants liable because "forcing the student-plaintiffs to read school books which teach or inculcate values in violation of their religious beliefs and convictions is a clear violation of their rights to the free exercise of religion protected by the First and Fourteenth Amendments to the United States Constitution."

C.

The defendants filed a motion to dismiss or, in the alternative, for summary judgment. The district court granted the defendants' motion for summary judgment, concluding that although passages in the reading textbooks might offend sincere religious beliefs of the plaintiffs, the books appeared neutral on the subject of religion and did not violate the plaintiffs' constitutional rights. *Mozert* v. *Hawkins County Public Schools*, 582 F.Supp. 201 (E.D. Tenn. 1984). On appeal this court reversed and remanded for further proceedings. *Mozert* v. *Hawkins County Public Schools*, 765 F.2d 75 (6th Cir. 1985). This court concluded that summary judgment was improper because issues of material fact were present. This conclusion was based largely on the fact that the defendants had filed an answer in which they put in issue, either denying categorically, or for lack of information, many of the allegations of the com-

plaint including the basic issues of the sincerity of the plaintiffs' religious beliefs and the burden that use of the Holt series placed upon those beliefs. In remanding, this court stated, "The court expresses no opinion on the merits of the plaintiffs' claims or those of the defendants as we have considered only the procedural posture of the case under Rule 56, Federal Rules of Civil Procedure." *Id.* at 79.

II

A.

Following remand the Commissioner of Education of the State of Tennessee was permitted to intervene as a defendant. At a pretrial hearing the parties made certain stipulations. Counsel for the defendants stipulated that the plaintiffs' religious beliefs are sincere and that certain passages in the reading texts offend those beliefs. However, counsel steadfastly refused to stipulate that the fact that the plaintiffs found the passages offensive made the reading requirement a burden on the plaintiffs' constitutional right to the free exercise of their religion. Similarly, counsel for the plaintiffs stipulated that there was a compelling state interest for the defendants to provide a public education to the children of Hawkins County. However, counsel stipulated only to a narrow definition of the compelling state interest—one that did not involve the exclusive use of a uniform series of textbooks. These stipulations left for trial the issues of whether the plaintiffs could show a burden on their free exercise right, in a constitutional sense, and whether the defendants could show a compelling interest in requiring all students in grades 1-8 of the Hawkins County public schools to use the Holt, Rinehart and Winston basal reading textbooks. These were questions of law to be determined on the basis of evidence produced at trial.

The parties also agreed to a bifurcated trial. The court would conduct a bench trial and if an unconstitutional burden were found and no compelling state interest required judgment for the defendants, a separate jury trial would be held to set

damages. The parties subsequently entered a joint waiver of the right to trial by jury, and the district court assessed damages and entered judgment accordingly.

B.

Vicki Frost was the first witness for the plaintiffs and she presented the most complete explanation of the plaintiffs' position. The plaintiffs do not belong to a single church or denomination, but all consider themselves born again Christians. Mrs. Frost testified that the word of God as found in the Christian Bible "is the totality of my beliefs." There was evidence that other members of their churches, and even their pastors, do not agree with their position in this case.

Mrs. Frost testified that she had spent more than 200 hours reviewing the Holt series and had found numerous passages that offended her religious beliefs. She stated that the offending materials fell into seventeen categories which she listed. These ranged from such familiar concerns of fundamentalist Christians as evolution and "secular humanism" to less familiar themes such as "futuristic supernaturalism," pacifism, magic and false views of death.

In her lengthy testimony Mrs. Frost identified passages from stories and poems used in the Holt series that fell into each category. Illustrative is her first category, futuristic supernaturalism, which she defind as teaching "Man As God." Passages that she found offensive described Leonardo da Vinci as the human with a creative mind that "came closest to the divine touch." Similarly, she felt that a passage entitled "Seeing Beneath the Surface" related to an occult theme, by describing the use of imagination as a vehicle for seeing things not discernible through our physical eyes. She interpreted a poem, "Look at Anything," as presenting the idea that by using imagination a child can become part of anything and thus understand it better. Mrs. Frost testified that it is an "occult practice" for children to use imagination beyond the limitation of scriptural authority. She testified that the story that alerted

her to the problem with the reading series fell into the category of futuristic supernaturalism. Entitled "A Visit to Mars," the story portrays thought transfer and telepathy in such a way that "it could be considered a scientific concept," according to this witness. This theme appears in the testimony of several witnesses, *i.e.*, the materials objected to "could" be interpreted in a manner repugnant to their religious beliefs.

Mrs. Frost described objectionable passages from other categories in much the same way. Describing evolution as a teaching that there is no God, she identified 24 passages that she considered to have evolution as a theme. She admitted that the textbooks contained a disclaimer that evolution is a theory, not a proven scientific fact. Nevertheless, she felt that references to evolution were so pervasive and presented in such a factual manner as to render the disclaimer meaningless. After describing her objection to passages that encourage children to make moral judgments about whether it is right or wrong to kill animals, the witness stated, "I thought they would be learning to read, to have good English and grammar, and to be able to do other subject work." Asked by plaintiffs' attorney to define her objection to the text books, Mrs. Frost replied:

> Very basically, I object to the Holt, Rhinehart [sic] Winston Series as a whole, what the message is as a whole. There are some contents which are objectionable by themselves, but my most withstanding [sic] objection would be to the series as a whole.

Another witness for the plaintiffs was Bob Mozert, father of a middle school and an elementary school student in the Hawkins County system. His testimony echoed that of Vicki Frost in large part, though his answers to questions tended to be much less expansive. He also found objectionable passages in the readers that dealt with magic, role reversal or role elimination, particularly biographical material about women who have been recognized for achievements outside their homes, and emphasis on one world or a planetary society. Both witnesses testified under cross-examination that the plaintiff parents objected to passages that expose their children to

other forms of religion and to the feelings, attitudes and values of other students that contradict the plaintiffs' religious views without a statement that the other views are incorrect and the plaintiffs' views are the correct ones.

C.

The district court held that the plaintiffs' free exercise rights have been burdened because their "religious beliefs compel them to refrain from *exposure* to the Holt series," and the defendant school board "has effectively required that the student plaintiffs either read the offensive texts or give up their free public education." *Mozert* v. *Hawkins County Public Schools*, F.Supp. 1194 1200 (E.D. Tenn. 1986), (emphasis added). In reaching this conclusion the district court analogized the plaintiffs' position to that of a sabbatarian who was denied unemployment compensation benefits for refusing to work on Saturdays, *Sherbert* v. *Verner*, 374 U.S. 398 (1963), a Jehovah's Witness who was denied unemployment compensation benefits after quitting a job that required him to work on military tanks, *Thomas* v. *Review Board*, 450 U.S. 707 (1981), and a conscientious objector who refused to participate in ROTC training, *Spence* v. *Bailey*, 465 F.2d 797 (6th Cir. 1972).

The district court went on to find that the state had a compelling interest "in the education of its young," 647 F.Supp. at 1200, but that it had erred in choosing "to further its legitimate and overriding interest in public education by mandating the use of a single basic reading series," *id.* at 1201, in the face of the plaintiffs' religious objections. The court concluded that the proof at trial demonstrated that the defendants could accommodate the plaintiffs without material and substantial disruption to the educational process by permitting the objecting students to "opt out of the school district's reading program," *id.* at 1203, and meet the reading requirements by home schooling. Tennessee's school attendance statute requires parents to cause their children between the ages of 7 and 16 to attend either a public or non-public school. "Non-public school" is defined to mean "a church-related school, a private school or a

home school." TCA 49-6-3001. Although the statute appears to contemplate that a student will attend one or the other of the three approved types of school, the district court apparently believed that a partial opt-out would be consistent with the statutory scheme.

The court entered an injunction prohibiting the defendants "from requiring the student-plaintiffs to read from the Holt series," and ordering the defendants to excuse the student plaintiffs from their classrooms "[d]uring the normal reading period" and to provide them with suitable space in the library or elsewhere for a study hall. 647 F. Supp. at 1203. The Court also dismissed the individual school board members as defendants on qualified immunity grounds and ordered a hearing on damages against the Hawkins County Board of Education. *Id.* at 1204. This hearing was held on December 15, 1983, following which the court awarded damages to the plaintiffs in the total amount of $51,531, largely to reimburse the plaintiff families for the costs of sending their children to alternate schools and the costs of pursuing this lawsuit.

III.

A.

The first question to be decided is whether a governmental requirement that a person be exposed to ideas he or she finds objectionable on religious grounds constitutes a burden on the free exercise of that person's religion as forbidden by the First Amendment. This is precisely the way the superintendent of the Hawkins County schools framed the issue in an affidavit filed early in this litigation. In his affidavit the superintendent set forth the school system's interest in a uniformity of reading texts. The affidavit also countered the claims of the plaintiffs that the schools were inculcating values and religious doctrines contrary to their religious beliefs, stating: "Without expressing an opinion as to the plaintiffs' religious beliefs, I am of the opinion that plaintiffs misunderstand the fact that exposure to something does not constitute teaching, indoctrination,

opposition or promotion of the things exposed. While it is true that these textbooks expose the student to varying values and religious backgrounds, neither the textbooks nor the teachers teach, indoctrinate, oppose or promote any particular value or religion." That the district court accepted the issue as thus framed is clear from its reference to "exposure to the Holt series."

It is also clear that exposure to objectionable material is what the plaintiffs objected to albeit they emphasize the repeated nature of the exposure. The complaint mentioned only the textbooks that the students were required to read. It did not seek relief from any method of teaching the material and did not mention the teachers' editions. The plaintiffs did not produce a single student or teacher to testify that any student was ever required to affirm his or her belief or disbelief in any idea or practice mentioned in the various stories and passages contained in the Holt series. However, the plaintiffs appeared to assume that materials clearly presented as poetry, fiction and even "make-believe" in the Holt series were presented as facts which the students were required to believe. Nothing in the record supports this assumption.

At numerous places in her testimony Vicki Frost referred to various exercises and suggestions in the teachers' manuals as support for her view that objectionable ideas were being inculcated as truth rather than being offered as examples of the variety of approaches possible to a particular question. However, the students were not required to read the teachers' materials. While these materials suggested various ways of presenting the lessons, including "acting out" and round table discussions, there was no proof that any plaintiff student was ever called upon to say or do anything that required the student to affirm or deny a religious belief or to engage or refrain from engaging in any act either required or forbidden by the student's religious convictions. Mrs. Frost seemed to assume that each teacher used every suggested exercise or teaching tool in the teachers' editions. There was evidence that reading aloud and acting out the themes encountered in school lessons help

young people learn. One of the teachers stated that students read some of the stories aloud. Proof that an objecting student was *required* to participate beyond reading and discussing assigned materials, or was disciplined for disputing assigned materials, might well implicate the Free Exercise Clause because the element of compulsion would then be present. But this was not the case either as pled or proved. The record leaves no doubt that the district court correctly viewed this case as one involving exposure to repugnant ideas and themes as presented by the Holt series.

Vicki Frost testified that an occasional reference to role reversal, pacifism, rebellion against parents, one-world government and other objectionable concepts would be acceptable, but she felt it was the repeated references to such subjects that created the burden. The district court suggested that it was a matter of balance, *id.* at 1199, apparently believing that a reading series that presented ideas with which the plaintiffs agree in juxtaposition to those with which they disagree would pass constitutional muster. While balanced textbooks are certainly desirable, there would be serious difficulties with trying to cure the omissions in the Holt series, as plaintiffs and their expert witnesses view the texts.

However, the plaintiffs' own testimony casts serious doubt on their claim that a more balanced presentation would satisfy their religious views. Mrs. Frost testified that it would be acceptable for the schools to teach her children about other philosophies and religions, but if the practices of other religions were described in detail, or if the philosophy was "profound" in that it expressed a world view that deeply undermined her religious beliefs, then her children "would have to be instructed to [the] error [of the other philosophy]." It is clear that to the plaintiffs there is but one acceptable view—the Biblical view, as they interpret the Bible. Furthermore, the plaintiffs view every human situation and decision, whether related to personal belief and conduct or to public policy and programs, from a theological or religious perspective. Mrs. Frost testified that many political issues have theological roots and that there

would be "no way" certain themes could be presented without violating her religious beliefs. She identified such themes as evolution, false supernaturalism, feminism, telepathy and magic as matters that could not be presented in any way without offending her beliefs. The only way to avoid conflict with the plaintiffs' beliefs in these sensitive areas would be to eliminate all references to the subjects so identified. However, the Supreme Court has clearly held that it violates the Establishment Clause to tailor a public school's curriculum to satisfy the principles or prohibitions of any religion. *Epperson* v. *Arkansas*, 393 U.S. 97, 106 (1968).

The testimony of the plaintiffs' expert witness, Dr. Vitz, illustrates the pitfalls of trying to achieve a balance of materials concerning religion in a reading course. He found "markedly little reference to religion, particularly Christianity, and also remarkably little to Judaism" in the Holt series. His solution would be to "beef up" the references to these two dominant religions in the United States. However, an adherent to a less widely professed religion might then object to the slighting of his or her faith. Balance in the treatment of religion lies in the eye of the beholder. Efforts to achieve the particular "balance" desired by any individual or group by the addition or deletion of religious material would lead to a forbidden entanglement of the public schools in religious matters, if done with the purpose or primary effect of advancing or inhibiting religion. *Epperson*, 393 U.S. at 107; *Abington*, 374 U.S. at 222.

B.

In this case the district court erroneously applied decisions based on governmental requirements that objecting parties make some affirmation or take some action that offends their religious beliefs. In *Sherbert* the burden on the plaintiff's right of free exercise consisted of a governmental requirement that she either work on her Sabbath Day or forfeit her right to benefits. Similarly, in *Thomas* the plaintiff was denied a benefit for refusing to engage in the production of armaments. In each case the burden on the plaintiff's free exercise of religion con-

sisted of being required to perform an act which violated the plaintiffs' religious convictions or forego benefits. Ms. Sherbert was not merely exposed to the view that others in the work force had no religious scruples against working on Saturdays and Mr. Thomas was not merely exposed to government publications designed to encourage employees to produce armaments. In each case there was compulsion to do an act that violated the plaintiffs' religious convictions. In *Hobbie* v. *Unemployment Appeals Commission of Florida*, ___ U.S. ___, 107 S.Ct. 1046 (1987), the Supreme Court reaffirmed its holdings in *Sherbert* and *Thomas*, emphasizing that in both cases there was compulsion either to do an act that was prohibited by the plaintiff's religion or to modify his or her behavior and violate religious beliefs. In *Spence* this court upheld a conscientious objector's right not to be required to participate in his high school's ROTC program. The court found that Spence's claim resembled Sherbert's "since it compels the conscientious objector either to engage in military training contrary to his religious beliefs, or to give up his public education." 465 F.2d at 799. It is clear that it was being compelled *to engage* in military training, not being exposed to the fact that others do so, that was found to be an unconstitutional burden.

In *Sherbert*, *Thomas* and *Hobbie* there was governmental compulsion to engage in conduct that violated the plaintiffs' religious convictions. That element is missing in the present case. The requirement that students read the assigned materials and attend reading classes, in the absence of a showing that this participation entailed affirmation or denial of a religious belief, or performance or non-performance of a religious exercise or practice, does not place an unconstitutional burden on the students' free exercise of religion.

B.

In addition to the cases cited by the district court, the plaintiffs, in this court, have relied particularly upon three Supreme Court decisions. We find them all distinguishable.

The issue in *Torcaso* v. *Watkins*, 367 U.S. 488 (1961), was whether a state could deny public office to a person solely because of the person's refusal to declare a belief in God. Quoting from its earlier decision in *Everson* v. *Board of Education*, 330 U.S. 1, 15 (1947), the Court stated:

> We repeat and reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion."

Id. at 495. Since there was no evidence that the plaintiff students were ever required to profess or deny a religious belief the issue in *Torcaso* simply is not presented by the instant case.

Board of Education v. Barnette, 319 U.S. 624 (1943), grew out of a school board rule that required all schools to make a salute to the flag and a pledge of allegiance a regular part of their daily program. All teachers and students were required to participate in the exercise and refusal to engage in the salute was considered an act of insubordination which would lead to expulsion and possible delinquency charges for being unlawfully absent. The plaintiff was a Jehovah's Witness who considered the flag an "image" which the Bible forbids worshiping in any way. Justice Jackson, writing for the Court, stated:

> Here, . . . we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means.

Id. at 631. Further, explaining the basis of the decision, Justice Jackson wrote:

> Here it is the State that employs a flag as a symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks.
>
> * * *
>
> It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and attitude of mind.

Id. at 633. It is abundantly clear that the exposure to materials in the Holt series did not compel the plaintiffs to "declare a belief," "communicate by word and sign [their] acceptance" of the ideas presented, or make an "affirmation of a belief and an attitude of mind." In *Barnette* the unconstitutional burden consisted of compulsion either to do an act that violated the plaintiffs religious convictions or communicate an acceptance of a particular idea or affirm a belief. No similar compulsion exists in the present case.

It is clear that governmental compulsion either to do or refrain from doing an act forbidden or required by one's religion, or to affirm or disavow a belief forbidden or required by one's religion, is the evil prohibited by the Free Exercise Clause. In *Abington School District* v. *Schempp*, 374 U.S. 203, 223 (1963), the Court described the Free Exercise Clause as follows:

> Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.

See also *Engel* v. *Vitale*, 370 U.S. 421, 430 (1962) ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion. . . .")

The plaintiffs appear to contend that the element of compulsion was supplied by the requirement of class participation in the reading exercises. As we have pointed out earlier, there is no proof in the record that any plaintiff student was required to engage in role play, make up magic chants, read aloud or engage in the activity of haggling. In fact, the Director of Education for the State of Tennessee testified that most teachers do not adhere to the suggestions in the teachers' manuals and a teacher for 11 years in the Hawkins County system stated

that she looks at the lesson plans in the teachers' editions, but "does her own thing." Being exposed to other students performing these acts might be offensive to the plaintiffs, but it does not constitute the compulsion described in the Supreme Court cases, where the objector was required to affirm or deny a religious belief or engage or refrain from engaging in a practice contrary to sincerely held religious beliefs.

D.

The third Supreme Court decision relied upon by the plaintiffs is the only one that might be read to support the proposition that requiring mere exposure to materials that offend one's religious beliefs creates an unconstitutional burden on the free exercise of religion. *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). However, *Yoder* rested on such a singular set of facts that we do not believe it can be held to announce a general rule that exposure without compulsion to act, believe, affirm or deny creates an unconstitutional burden. The plaintiff parents in *Yoder* were Old Order Amish and members of the Conservative Amish Mennonite Church, who objected to their children being required to attend either public or private schools beyond the eighth grade. Wisconsin school attendance law required them to cause their children to attend school until they reached the age of 16. Unlike the plaintiffs in the present case, the parents in *Yoder* did not want their children to attend any high school or be exposed to any part of a high school curriculum. The Old Order Amish and the Conservative Amish Mennonites separate themselves from the world and avoid assimilation into society, and attempt to shield their children from all worldly influences. The Supreme Court found from the record that—

> [C]ompulsory school attendance to age 16 for Amish children carries with it a very real threat to undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region.

Id. at 218 (footnote omitted).

As if to emphasize the narrowness of its holding because of the unique 300 year history of the Old Amish Order, the Court wrote:

> It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority have but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith.

Id. at 222 (citation omitted). This statement points up dramatically the difference between *Yoder* and the present case. The parents in *Yoder* were required to send their children to some school that prepared them for life in the outside world, or face official sanctions. The parents in the present case want their children to acquire all the skills required to live in modern society. They also want to have them excused from exposure to some ideas they find offensive. Tennessee offers two options to accommodate this latter desire. The plaintiff parents can either send their children to church schools or private schools, as many of them have done, or teach them at home. Tennessee law prohibits any state interference in the education process of church schools:

> The state board of education and local boards of education are prohibited from regulating the selection of faculty or textbooks or the establishment of a curriculum in church-related schools.

TCA 49-50-801(b). Similarly the statute permitting home schooling by parents or other teachers prescribes nothing with respect to curriculum or the content of class work.

Yoder was decided in large part on the impossibility of reconciling the goals of public education with the religious requirement of the Amish that their children be prepared for life in a separated community. As the Court noted, the requirement of school attendance to age 16 posed a "very real threat of under-

mining the Amish community and religious practice as they exist today. . . ." 406 U.S. at 218. No such threat exists in the present case, and Tennessee's school attendance laws offer several options of those parents who want their children to have the benefit of an education which prepares for life in the modern world without being exposed to ideas which offend their religious beliefs.

E.

At oral argument plaintiffs' counsel identified *Grove* v. *Mead School Dist. No. 354*, 753 F.2d 1528 (9th Cir. 1985), *cert. denied*, 106 S.Ct. 85 (1986), as a decision which strongly supports the plaintiffs' position. In *Grove* a student and her mother objected to being required to read one book assigned in an English literature class. The student was permitted to read a different book and to leave the classroom during discussion of the book she found offensive; however, she chose to remain during the discussion. The mother brought suit to require the school board to remove the book from the required reading list based on her religious objections to its content. The court of appeals affirmed summary judgment for the school board. In a concurring opinion Judge Canby wrote that plaintiffs' allegation that they believe that "eternal religious consequences" would result to the parents and children from exposure to the offending book "would *probably* be sufficient to present a free exercise question" if the student had been required to read the book or remain in the classroom while it was being discussed. *Id.* at 1541-42 (emphasis added). This observation in dicta must be considered in context. The court of appeals in *Grove* was considering a case where summary judgment had been granted, much as this court considered the present case on the first appeal. Judge Canby did not state that the plaintiff had established a case of burden on the free exercise of religion; he stated only that if she had been required to read the book and remain in class she "probably" would have presented a free exercise question.

While relying on this somewhat speculative observation, the plaintiffs failed to note other positive statements in the same concurring opinion that, while addressing a different issue, are at odds with their theories:

> Were the free exercise clause violated whenever governmental activity is offensive to or at variance with sincerely held religious precepts, virtually no governmental program would be constitutionally possible.

Id. at 1542.

> The lesson is clear governmental actions that merely offend or cast doubt on religious beliefs do not on that account violate free exercise. An actual burden on the profession or exercise of religion is required.
>
> In short, distinctions must be drawn between those governmental actions that actually interfere with the exercise of religion, and those that merely require or result in exposure to attitudes and outlooks at odds with perspectives prompted by religion.

Id. at 1543 (citation omitted). These statements echo similar ones in the majority opinion, *e.g.*,

> To establish a violation of that clause [Free Exercise], a litigant must show that challenged state action has a coercive effect that operates against a litigant's *practice* of his or her religion.

Id. at 1533 (emphasis added).

IV.

A.

The Supreme Court has recently affirmed that public schools serve the purpose of teaching fundamental values "essential to a democratic society." These values "include tolerance of divergent political and religious views" while taking into account "consideration of the sensibilities of others." *Bethel School Dist. No. 403* v. *Fraser*, ___ U.S. ___, 106 S.Ct. 3159, 3164 (1986). The Court has noted with apparent approval the view of

some educators who see public schools as an "assimilative force" that brings together "diverse and conflicting elements" in our society "on a broad but common ground." *Ambach* v. *Norwick*, 441 U.S. 68, 77 (1979), citing works of J. Dewey, N. Edwards and H. Richey. The critical reading approach furthers these goals. Mrs. Frost stated specifically that she objected to stories that develop "a religious tolerance that all religions are merely different roads to God." Stating that the plaintiffs reject this concept, presented as a recipe for an ideal world citizen, Mrs. Frost said, "We cannot be tolerant in that we accept other religious views on an equal basis with ours." While probably not an uncommon view of true believers in any religion, this statement graphically illustrates what is lacking in the plaintiffs' case.

The tolerance of divergent . . . religious views" referred to by the Supreme Court is a civil tolerance, not a religious one. It does not require a person to accept any other religion as the equal of the one to which that person adheres. It merely requires a recognition that in a pluralistic society we must "live and let live." If the Hawkins County schools had required the plaintiff students either to believe or say they believe that "all religions are merely different roads to God," this would be a different case. No instrument of government can, consistent with the Free Exercise Clause, require such a belief or affirmation. However, there was absolutely no showing that the defendant school board sought to do this; indeed, the school board agreed at oral argument that it could not constitutionally do so. Instead, the record in this case discloses an effort by the school board to offer a reading curriculum designed to acquaint students with a multitude of ideas and concepts, though not in proportions the plaintiffs would like. While many of the passages deal with ethical issues, on the surface at least, they appear to us to contain no religious or anti-religious messages. Because the plaintiffs perceive every teaching that goes beyond the "three Rs" as inculcating religious ideas, they admit that any value-laden reading curriculum that did not affirm the truth of their beliefs would offend their religious convictions.

Although it is not clear that the plaintiffs object to all critical reading, Mrs. Frost did testify that she did not want her children to make critical judgments and exercise choices in areas where the Bible provides the answer. There is no evidence that any child in the Hawkins County schools was required to make such judgments. It was a goal of the school system to encourage this exercise, but nowhere was it shown that it was required. When asked to comment on a reading assignment, a student would be free to give the Biblical interpretation of the material or to interpret it from a different value base. The only conduct compelled by the defendants was reading and discussing the material in the Holt series, and hearing other students' interpretations of those materials. This is the exposure to which the plaintiffs objected. What is absent from this case is the critical element of compulsion to affirm or deny a religious belief or to engage or refrain from engaging in a practice forbidden or required in the exercise of a plaintiff's religion.

B.

In *McCollum* v. *Board of Education*, 333 U.S. 203 (1948), the Supreme Court held invalid a practice which permitted weekly religious instruction for consenting pupils in public school classrooms. Those students who did not choose to participate were required to leave their regular classrooms and go to another part of the school building to continue their secular studies. Although *McCollum* involved the Establishment Clause, the several opinions discussed both religion clauses at some length. In his concurring opinion Justice Jackson emphasized that some compulsion to perform a religiously prohibited ritual or make a religiously prohibited affirmation is essential to a claim of infringement of the free exercise rights of students in public schools. Noting the large number of separate religious bodies existing in the United States, he wrote:

> If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds.

> Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits.

Id. at 235. The fact that schools might be subjected to constant law suits is certainly not determinative. However, the Supreme Court has cautioned that "[j]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint." *Epperson*. 393 U.S. at 104. When asked to "interpose," courts must examine the record very carefully to make certain that a constitutional violation has occurred before they order changes in an educational program adopted by duly chosen local authorities.

Quite recently the Supreme Court quoted Justice Douglas, concurring in *Sherbert* v. *Verner*, 374 U.S. at 412, as follows:

> [T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government.

Bowen v. *Roy*, ___ U.S. ___, 106 S.Ct. 2147, 2152 (1986). Paraphrasing this thought, the Court wrote:

> The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures.

Id. Since we have found none of the prohibited forms of governmental compulsion in this case, we conclude that the plaintiffs failed to establish the existence of an unconstitutional burden. Having determined that no burden was shown, we do not reach the issue of the defendants' compelling interest in requiring a uniform reading series or the question, raised by the defendant, of whether awarding damages violated the Establishment Clause.

Judge Boggs concludes that the majority reverses the district court because it found the plaintiffs' claims of First Amendment protection so extreme as obviously to violate the Establishment Clause. This is not the holding of the majority. We do point out that under certain circumstances the plaintiffs,

by their own testimony, would only accept accommodations that would violate the Establishment Clause. However, this is not the holding. What we do hold is that the requirement that public school students study a basal reader series chosen by the school authorities does not create an unconstitutional burden under the Free Exercise Clause when the students are not required to affirm or deny a belief or engage or refrain from engaging in a practice prohibited or required by their religion. There was no evidence that the conduct required of the students was forbidden by their religion. Rather, the witnesses testified that reading the Holt series "could" or "might" lead the students to come to conclusions that were contrary to teachings of their and their parents' religious beliefs. This is not sufficient to establish an unconstitutional burden.

Judge Boggs also implies that the majority distorts the record and decides the case on a basis different from that upon which the plaintiffs proceeded. This would be a valid criticism if we were reviewing a judgment on the pleadings. However, as Judge Boggs notes, this case was decided following a full trial. The plaintiffs did not confine themselves to the language of their complaint, but testified expansively with respect to the claims and issues before the court. We have decided the case that was actually tried, as permitted by Rule 15(b), Fed. R. Civ. P.

The judgment of the district court granting injunctive relief and damages is reversed, and the case is remanded with directions to dismiss the complaint. No costs are allowed. The parties will bear their own costs on appeal.

Re: Nos. 86-6144, 86-6179, 86-6180, 87-5024

Mozert* v. *Hawkins County Board of Education

KENNEDY, Circuit Judge, concurring. I agree with Chief Judge Lively's analysis and concur in his opinion. However, even if I were to conclude that requiring the use of the Holt series or another similar series constituted a burden on appellees' free exercise rights, I would find the burden justified by a compelling state interest.

Appellants have stated that a principal [sic] educational objective is to teach the students how to think critically about complex and controversial subjects and to develop their own ideas and make judgments about these subjects. Several witnesses testified that the only way to achieve these objectives is to have the children read a basal reader, participate in class discussions, and formulate and express their own ideas and opinions about the materials presented in a basal reader. Thus, appellee students are required to read stories in the Holt series, make personal judgments about the validity of the stories, and to discuss why certain characters in the stories did what they did, or their values and whether those values were proper. Appellee parents testified that they object to their children reading the Holt readers, being exposed to controversial ideas in the classroom, and to their children making critical judgments and formulating their own ideas about anything for which they believe the Bible states a rule or position.[1]

In *Bethel School Dist. No. 403* v. *Fraser*, 106 S. Ct. 3159, 3164 (1986), the Supreme Court stated: "The role and purpose of the American public school system was well described by two historians, saying 'public education must prepare pupils for citizenship in the Republic.'" Additionally, the *Bethel School* Court stated that the state through its public schools

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[1] Appellee parents have indicated that they would not object to much of the material in the Holt readers if it were balanced by material supporting their religious beliefs. To the extent they assert a burden from the omission of material, I question how an omission can constitute a burden.

must "inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." *Id.* (quoting C. Beard & M. Beard, New Basic History of the United States 228 (1968)).[2] Teaching students about complex and controversial social and moral issues is just as essential for preparing public school students for citizenship and self-government as inculcating in the students the habits and manners of civility.

The evidence at trial demonstrated that mandatory participation in reading classes using the Holt series or some similar readers is essential to accomplish this compelling interest and that this interest could not be achieved any other way. Several witnesses for appellants testified that in order to develop critical reading skills, and therefore achieve appellants' objectives, the students must read and discuss complex, mor-

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[2] Last term the Court recognized that public school officials have considerable discretion in structuring their curriculum to achieve these results. *Edwards* v. *Aguillard*, *No. 85-1513 (U.S.L.W. June 19,1987)*. *In Maher* v. *Roe*, 432 U.S. 464 (1977), the Court recognized that "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with a legislative policy." *Id.* at 475 (footnote omitted). The *Maher* Court acknowledged its decision in *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), where the Court upheld a parent's right to have his child taught a particular foreign language, and in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), where it upheld a parent's right to send his child to private school. Nevertheless, the Court stated:

> neither case denied to a State the policy choice of encouraging the preferred course of action. Indeed, in *Meyer*, the Court was careful to state that the power of the State "to prescribe a curriculum" that included English and excluded German in its free public schools "is not questioned." Similarly, *Pierce* casts no shadow over a State's power to favor public education by funding it—a policy choice pursued in some States for more than a century.

432 U.S. at 476-77.

ally and socially difficult issues. Many of these necessarily will be subjects on which appellees believe the Bible states the rule or correct position. Consequently, accommodating appellees' beliefs would unduly interfere with the fulfillment of the appellants' objectives. *Cf. United States* v. *Lee*, 455 U.S. 252, 260 (1982). Additionally, mandatory participation in the reading program is the least restrictive means of achieving appellants' objectives. Appellees' objections would arise even if the School Board selected another basal reading textbook series since the students would be required to engage in critical reading and form their own opinions and judgments on many of the same issues.

The state and the Hawkins County School Board also have a compelling interest in avoiding disruption in the classroom. Hawkins County Schools utilize an integrated curriculum, designed to prepare students for life in a complex, pluralistic society, that reinforces skills and values taught in one subject in other areas. The Director of Elementary Education testified that teachers use every opportunity within the school day to reinforce information taught in the different subject areas. For example, the students may discuss stories in the Holt readers dealing with evolution or conservation of natural resources in the science course. This approach to learning is well-recognized and enables the students to see learning "as part of their total life, not just [as] bits and pieces." Taylor at 1270-71. This is particularly true in grades one through four where reading is taught throughout the school day, rather than in a particular period. Appellants would be unable to utilize effectively the critical reading teaching method and accommodate appellees' religious beliefs. If the opt-out remedy were implemented, teachers in all grades would have to either avoid the students discussing objectionable material contained in the Holt readers in non-reading classes or dismiss appellee students from class whenever such material is discussed. To do this the teachers would have to determine what is objectionable to appellees. This would either require that appellees review all teaching materials or that all teachers review appellees' extensive testi-

mony. If the teachers concluded certain material fell in the objectionable classification but nonetheless considered it appropriate to have the students discuss this material, they would have to dismiss appellee students from these classes.[3] The dismissal of appellee students from the classes would result in substantial disruption to the public schools.

Additionally, Hawkins County Public Schools have a compelling interest in avoiding religious divisiveness. The Supreme Court has emphasized that the avoidance of religious divisiveness is nowhere more important than in public education, for "[t]he government's activities in this area can have a magnified impact on impressionable young minds . . . . " *Grand Rapids School Dist.* v. *Ball*, 473 U.S. 373, 383 (1985). The opt-out remedy would permit appellee students to be released from a core subject every day *because* of their religion. Thus, although some students in the Hawkins County schools are presently released from class during the school day for special instruction, these students are not released because they have a religious objection to material being presented to the class. The present case is distinguishable from this Court's decision in *Spence* v. *Bailey*, 465 F.2d 797 (6th Cir. 1972), inasmuch as the student in *Spence* was permitted to not participate in the school's R.O.T.C. program, a non-core subject. There is less divisiveness in excusing someone from military training then [sic] in excusing them from discussing a multitude of ideas. Accordingly, the opt-out remedy ordered by the court is inconsistent with the public schools' compelling interest in "promoting cohesion among a heterogenous democratic people." *Illinois ex rel. McCollum* v. *Board of Educ.*, 333 U.S. 203, 216 (1948) (Frankfurter, J., concurring).

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[3] It is important to note that with respect to some of appellees' objections, any required discussion of objectionable materials would violate appellees' religious beliefs. It is not the mere "unbalanced treatment" of these materials that appellees find offensive.

The divisiveness and disruption caused by the opt-out remedy would be magnified if the schools had to grant other exemptions. Although the District Court found that no other objections to the Hawkins County public school curriculum have been raised and that Hawkins County is homogeneous from a religious perspective, this case would create a precedent for persons from other religions to request exemptions from core subjects because of religious objections.[4] If the school district were required to accommodate exceptions and permit other students to opt-out of the reading program and other core courses with materials others found objectionable, this would result in a public school system impossible to administer. As Justice Jackson stated in *McCollum*, every parent:

> has as good a right as this plaintiff to demand that the courts compel the schools to sift out of their teaching everything inconsistent with its doctrines. If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits.

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[4] In *United States* v. *Lee*, 455 U.S. 252 (1982), the Court, in an unanimous opinion, considered whether imposition of Social Security taxes on the Amish violated the free exercise clause because the Amish contended that it was against their religious beliefs to receive public insurance benefits and pay into public insurance funds. Although finding that participation in the program burdened the free exercise of their religion, the Court concluded that participation in the program was essential to accomplish the overriding governmental interest. *Id.* at 257-58. The Court emphasized that mandatory participation in the social security system was indispensable to the vitality of the system, and if participation were voluntary, it would undermine the effectiveness of the program. Additionally, the Court stated that the social security system could not accommodate exceptions that could arise from a *large number* of religious beliefs. *Id.* at 260.

333 U.S. at 235.

Accordingly, I also would reverse the judgment of the District Court for these additional reasons, as well as the reasons so well stated by Chief Judge Lively.

No. 86-6144/79/80,

***Mozert, et al.* Hawkins County Public Schools**

BOGGS, Circuit Judge, concurring. I concur with my colleagues that Hawkins County is not required by the Constitution to allow plaintiffs the latitude they seek in the educational program of these children. However, I reach that result on a somewhat different view of the facts and governing principles here. It seems that the court's opinion rests first on the view that plaintiffs' objection is to any exposure to contrary ideas, and that no one's religious exercise can be burdened simply by compelled exposure (Op. at pp. 9-10). Second, the opinion rests on the view that no burden can exist here because plaintiffs were not compelled to engage in any conduct prohibited by, or refrain from any practice required by, their religious beliefs (Op. at pp. 10, 21-23).

I do not believe these attempted distinctions will survive analysis. If the situation of these children is not a burden on their religious exercise, it must be because of a principle applicable to all religious objectors to public school curricula. Thus, I believe a deeper issue is present here, is implicitly decided in the court's opinion, and should be addressed openly. The school board recognizes no limitation on its power to require any curriculum, no matter how offensive or one-sided, and to expel those who will not study it, so long as it does not violate the Establishment Clause. Our opinion today confirms that right, and I would like to make plain my reasons for taking that position.

I

Preliminarily, as my colleagues indicate, we make no judgment on the educational, political or social soundness of the school board's decision to adopt this particular set of books and this general curricular approach. This is not a case about fundamentalist Christians or any particular set of beliefs.[1] It is

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[1] I note that the *amicus* brief of the American Jewish Committee

about the constitutional limits on the powers of school boards to prescribe a curriculum. For myself, I approach this case with a profound sense of sadness. At the classroom level, the pupils and teachers in these schools had in most cases reached a working accommodation. Only by the decisions of higher levels of political authority, and by more conceptualized presentations of the plaintiffs' positions, have we reached the point where we must decide these harsh questions today. The school board faced what must have seemed a prickly and difficult group of parents, however dedicated to their children's welfare. In a similar situation, the poet Edwin Markham described a solution:

> He drew a circle that shut me out—
> Heretic, Rebel, a thing to flout.
> But Love and I had the wit to win:
> We drew a circle that took him in![2]

As this case now reaches us, the school board rejects any effort to reach out and take in these children and their concerns. At oral argument, the board specifically argued that it was better for both plaintiffs' children and other children that they not be in the public schools, despite the children's obvious desire to obtain some of the benefits of public schooling. Though the board recognized that their allegedly compelling interests in shaping the education of Tennessee children could not be served at all if they drove the children from the school, the board felt it better not to be associated with any hybrid program.

Plaintiffs' requests were unusual, but a variety of accommodations in fact were made, with no evidence whatsoever of

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and other religious leaders agrees with plaintiffs on two points critical to, and rejected by, the court's opinion. First, that "the compelled use of a reading curriculum can burden Free Exercise Rights." Second, that "the school board's response to appellees' claims burdened their rights."

[2] E. Markham, "Outwitted," in *Best Loved Poems of the American People*, p. 67 (Garden City, 1957)

bad effects. Given the masses of speculative testimony as to the hypothetical future evils of accommodating plaintiffs in any way, had there been any evidence of bad effects from what actually occurred, the board would surely have presented it. As we ultimately decide here, on the present state of constitutional law, the school board is indeed entitled to say, "my way or the highway." But in my view the school board's decision here is certainly not required by the Establishment Clause.[3]

II

Returning to the treatment of plaintiffs' free exercise claim, I believe this is a more difficult case than outlined in the court's opinion. I disagree with the first proposition in the court's opinion, that plaintiffs object to any exposure to any contrary idea. I do not believe we can define for plaintiffs their belief as to what is religiously forbidden to be so comprehensive, where both they and the district court have spoken to the contrary. A reasonable reading of plaintiffs' testimony shows they object to the overall effect of the Holt series, not simply to any exposure to any idea opposing theirs. The district court specifically found that the objection was to exposure to the Holt series, not to any single story or idea. 647 F. Supp. at 1199.

Ultimately, I think we must address plaintiffs' claims as they actually impact their lives: it is their belief that they should not take a course of study which, on balance, to them, denigrates and opposes their religion, and which the state is compelling them to take on pain of forfeiting all other benefits of public education.

Their view may seem silly or wrong-headed to some, but it is a sincerely held religious belief. By focussing narrowly on references that make plaintiffs appear so extreme that they

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[3] A different situation would be presented if the purpose or primary effect of any accommodation were to be the advancement of plaintiffs' religion. (Op. at 12). I see no evidence of such purpose or effect from the accommodation in this case.

could never be accommodated, the court simply leaves resolution of the underlying issues here to another case, when we have plaintiffs with a more sophisticated understanding of our own and Supreme Court precedent, and a more careful and articulate presentation of their own beliefs.

Under the court's assessment of the facts, this is a most uninteresting case. It is not the test case sought, or feared, by either side. The court reviews the record and finds that the plaintiffs actually want a school system that affirmatively teaches the correctness of their religion, and prevents other students from mentioning contrary ideas. If that is indeed the case, then it can be very simply resolved. It would obviously violate the Establishment Clause for any school system to agree with such an extravagant view.

It should be noted and emphasized that if such is the holding, this decision is largely irrelevant to the national legal controversy over this case. The extent to which school systems may constitutionally require students to use educational materials that are objectionable, contrary to, or forbidden by their religious beliefs is a serious and important issue. The question of exactly how terms such as "contrary," "objectionable," and "forbidden," are to be assessed in the context of religious beliefs is a subtle and interesting one. But this decision, as I understand it, addresses none of those questions. When a case arises with more sophisticated or cagey plaintiffs, or less skillful cross-examination, that true issue must be faced anew, with little guidance from this decision. Since these plaintiffs' claims are rejected because they are read to be so extreme as obviously to violate the Establishment Clause, this case is no precedent for the more specific and narrowly drawn complaint that the district court and plaintiffs' counsel (and, to me, the plaintiffs) thought the plaintiffs were making.

I find the court's conclusion based on its reading of the record to be unsatisfactory on the factual basis of what was said at the trial. The trial strategies of the two sides were clear. The plaintiffs understood that the more thoroughgoing and exten-

sive their objections, the less possible would it be to accommodate them within the bounds of the Constitution. Therefore, the plaintiffs repeatedly stated their objections in terms of the overall Holt series.

The defendants equally clearly sought to depict plaintiffs' objections in the most constitutionally offensive terms. By skillful cross-examination, they did elicit on some occasions the statements on which the court relies. I believe these two lines of apparently contradictory testimony can be reconciled by recognizing the different meanings or usage of the same words or phrases such as "objectionable," "want," "or opposed to." These words can cover a gamut from mild objection or desire to constitutional insistence. Something may be "objectionable," in the sense that one would rather it did not happen, but it is something that must be endured. Conversely, it may be "objectionable" in the sense that it should not be permitted or one should not be required to endure it. Thus, I may find Muzak on buses, or in-flight movies, "objectionable," but that's life.[4] However, one might find the display of pornographic material in either location "objectionable" to the point that a relatively captive audience legally should not be subjected to it.

Similarly, plaintiffs may "want" a school system tailored exactly to their religious beliefs (that is why many people choose religious education), but they very well know that that is constitutionally impermissible. They "want" a particular type of accommodation that they have sought in this law suit, and they believe that they are constitutionally entitled to that. Judge Hull, who sat through eight days of trial testimony over these very issues, came to the same conclusion I do, expressed it in the form of a finding, and should not be overturned unless that finding is clearly erroneous. In my reading of the testimony, the judge's finding is not only not clearly erroneous, but it can only be reversed by a failure to recognize a distinction between the ideal education the parents want, and that level of

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[4] *See Pub. Util. Comm. of D.C.* v. *Pollak*, 343 U.S. 451 (1952).

accommodation and education which they believe is constitutionally required and which they "want" here. Thus, I believe we must take plaintiffs' claims as they have stated them—that they desire the accommodation of an opt-out, or alternative reading books, and no more. That is all they have ever asked for in their pleadings, in the arguments at trial and in appellate briefing and argument.

III

I also disagree with the court's view that there can be no burden here because there is no requirement of conduct contrary to religious belief. That view both slights plaintiffs' honest beliefs that studying the full Holt series would be conduct contrary to their religion, and overlooks other Supreme Court Free Exercise cases which view "conduct" that may offend religious exercise at least as broadly as do plaintiffs.

On the question of exposure to, or use of, books as conduct, we may recall the Roman Catholic Church's, "*Index Librorum Prohibitorum.*" This was a list of those books the reading of which was a mortal sin, at least until the second Vatican Council in 1962.[5] I would hardly think it can be contended that a school requirement that a student engage in an act (the reading of the book) which would specifically be a mortal sin under the teaching of a major organized religion would be other than "conduct prohibited by religion," even by the court's fairly restrictive standard. Yet, in what constitutionally important way can the situation here be said to differ from that? Certainly, a religion's size or formality of hierarchy cannot determine the religiosity of beliefs. Similarly, and analogous to our case, church doctrine before 1962 also indicated that portions of the banned books could be used or read in a context to show their error, and that references to, or small portions of, the books did not fall under the same ban.[6] Again, it seems incon-

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[5] *New Catholic Encyclopedia*. Vol. 7, pp. 434-35; Vol. 2, pp. 699-701 (McGraw-Hill, 1967).

[6] R.A. Burke, *What is the Index*, pp. 33, 58-9, 88 (Milwaukee, 1952).

ceivable that we would determine that a Catholic child had forfeited the right to object to committing a mortal sin by reading Hobbes because he was willing, in another context, to read small portions or excerpts of the same material.

While this argument would seem persuasive that studying objectionable material would be "conduct" contrary to religious belief, the court's opinion attempts to distinguish our case from *Thomas* v. *Review Board*, 450 U.S. 707 (1981), by emphasizing that the plaintiff there was asked to "engage in a practice" forbidden by his religion, and the plaintiffs here are not. I do not believe that distinction bears up under scrutiny. Thomas had to hook up chains to a conveyor in a factory. For Thomas, there was no commandment against hooking up chains. He asserted that this would be "aiding in the manufacture of items used in the advancement of war," because it was in a tank turret line, but he had also said that he would work in a steel factory that might ultimately sell to the military. (A fellow Witness was willing to work in the turret line.) 450 U.S. at 711, n.4, 715. This distinction appears as convoluted as plaintiffs' distinctions seem to some. Nevertheless, Thomas drew his line, and the Supreme Court respected it and dealt with it. "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id.* at 714.

Here, plaintiffs have drawn their line as to what required school activities, what courses of study, do and do not offend their beliefs to the point of prohibition. I would hold that if they are forced over that line, they are "engaging in conduct" forbidden by their religion. The court's excellent summary of its holding on this point (Op. at 22-23) appears to concede that what plaintiffs were doing in school was conduct, but that there "was no evidence that the conduct required of the students was forbidden by their religion." I cannot agree. The plaintiffs provided voluminous testimony of the conflict (in their view) between reading the Holt readers and their religious beliefs, including extensive Scriptural references. The district court found that "plaintiffs' religious beliefs *compel* them to refrain

from exposure to the Holt series." 647 F. Supp. at 1200 (emphasis supplied). I would think it could hardly be clearer that they believe their religion commands, not merely suggests, their course of action.

If plaintiffs did not use the exact words "reading these books is forbidden by our religion, "they certainly seemed to me to make that point clearly. The court's summary also re-emphasizes my point *(supra*, p.5) that the importance of this holding would be greatly diminished in a future case where plaintiffs can articulate the right set of words.

IV

I have given considerable thought to Judge Kennedy's opinion discussing the importance of the state's interest in "critical reading" and noting the plaintiffs' objection to such instruction. I conclude that the requirement of "critical reading," as accomplished in Tennessee, does not constitute a burden on the free exercise of religion for these plaintiffs separate from the required studying of the Holt books.

The most difficult case would be if the state were teaching "critical reading" in the sense that plaintiffs were told to believe (or were downgraded for not believing) that values comes from within oneself, rather than from an external religious source. If this were the case, I think it clear that such teaching would violate the Establishment Clause. Thus, if a pupil upon confronting one of the "moral dilemma" stories in the Holt series were to respond, "I believe you should do x because that's what the Bible tells us to do," the school may not attempt to argue the pupil out of it, or downgrade the pupil for not undertaking a supposedly "more sophisticated" analysis.

I do not understand Tennessee to be arguing to the contrary. Tennessee's representatives' own statements of what they are doing is somewhat muddled. The affidavit of County Superintendent Snodgrass says that the schools do not teach "any particular value" and that the schools "teach and promote reading, not values." On the other hand, other statements of

the state's position emphasized the values which are being taught. Defendants' expert on the teaching of reading, Dr. Farr, indicates that the author of the series wants students "to use their own value systems to respond" to the materials, with no indication that there would be any downgrading for using value systems that are religious.

Whether or not Tennessee insists on students responding to literature based only on self-centered values, I disagree with the idea that such a teaching of "critical reading" would constitute a compelling state interest which entitles the school board to deny plaintiffs the accommodation they seek. (Kennedy Op. at 1-3). The school board argues that "critical reading" is something so special that in the words of Farr, "it would be almost impossible to [teach critical reading consistent with the plaintiffs' religious objections]." This notion seems difficult to support. The simple answer to such a claim would seem to be the type of testing which is mandated for all non-public school students in Tennessee. Plaintiffs are quite confident of their ability to pass any consistent tests propounded by the state. Perhaps because of these facts, the state seems unwilling to rest its claims of educational damage on any such tests, and expounds a particularly slippery standard for "critical reading." In particular, when Farr is asked (on direct examination, by the school board's own attorney) if plaintiffs' children, who are getting good grades, must be learning what the state wants them to, he replies, "It's very difficult to measure evaluative and critical reading. . . . It would be very difficult to know that if that youngster is making adequate progress."

It seems to me to be extremely difficult, not to say unfair, to rest a compelling state interest on the asserted failure of plaintiffs to learn something which defendants are apparently unable to define and unwilling to test for. Mr. Justice Stewart has been unfairly derided as propounding an obscenity test of, "I know it when I see it," *Jacobellis* v. *Ohio*, 378 U.S. 184, 187 (1964), but it appears that the school board here seeks that kind of test for critical reading. Their view seems to be that if we are teaching it in the state classrooms, critical reading must be

happening, but if plaintiffs are learning reading outside that class (and testing as well as, or better than, the average state student), it must not be happening. I cannot agree with any such analysis of the state's interest in "critical reading."[7]

In any event, the test for a compelling interest is quite strict, and requires far more than this or other speculations on possible future evils. To be compelling, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963), quoting *Thomas* v. *Collins*, 323 U.S. 516, 530. *See Hobbie* v. *Unemployment Comm.*, 107 S.Ct. 1046, 1049-50 (1987); *Thomas*, 450 U.S. at 718-19. In the absence of any testimony as to actual problems from the accommodation that was provided, it is difficult to see how this standard could be met, if a constitutional burden were established.

V

Thus, I believe the plaintiffs' objection is to the Holt series as a whole, and that being forced to study the books is "conduct" contrary to their beliefs. In the absence of a narrower basis that can withstand scrutiny, we must address the hard issues presented by this case: (1) whether compelling this conduct forbidden by plaintiffs' beliefs places a burden on their free exercise of their religion, in the sense of earlier Supreme Court holdings; and (2) whether *within the context of the public schools*, teaching material offends a person's religious beliefs, but does not violate the Establishment Clause, can be a burden on free exercise.

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[7] At times, the school board's position recalls the scene in a modern classic, where a little girl entering first grade is told: "Now you tell your father not to teach you any more. It's best to begin reading with a fresh mind. You tell him I'll take over from here and try to undo the damage—." Discussing this later with her older brother, she is told that it's "a new way of teaching. [Teacher] learned about it in college. It'll be in all the grades soon. . . . It's the Dewey Decimal System." H. Lee, *To Kill a Mockingbird*, pp. 22-23 (Warner Books, 1982).

Determining whether the school board's action places a substantial burden on the plaintiffs free exercise of their religion requires a determination of the scope of the religious beliefs or practices protected by the Free Exercise Clause. Although the Supreme Court has shied away from attempting to define religion, the past forty years has witnessed an expansion of the court's understanding of religious belief. The concept of religion has shifted from a fairly narrow traditional theism, *Davis* .v *Beason*, 133 U.S. 333, 342 (1890); *United States* v. *Macintosh*, 283 U.S. 605, 633-34 (1931) (Hughes, C.J., dissenting), *overruled*, *Girouard* v. *United States*, 328 U.S. 61 (1946), to a broader concept providing protection for views of unorthodox and nontheistic faiths, *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 658-59 (1943); *Torcaso* v. *Watkins*, 367 U.S. 488,495 (1961); *United States* v. *Seeger*, *380 U.S. 163, 166 (1965); Welsh* v. *United States*, 398 U.S. 333 (1970). This expanded definition has been praised by many commentators, who argue for a definition of religion in the Free Exercise Clause that would protect practices based on an individual's belief system involving matters of ultimate concern, Note, *Toward a Constitutional Definition of Religion*, 91 Harv. L. Rev. 1056, 1072-75 (1978). Others support an interpretation which would provide protection for all beliefs that are "arguably religious." L. Tribe, *American Constitutional Law* § 14-6, at 828 (1978). The plaintiffs here have no problem fitting within any of the Court's various definitions of religion, as no one contends that their basic beliefs are not religious.

However, determining that plaintiffs' beliefs are religious does not automatically mean that all practices or observances springing from those beliefs are entitled to the same amount of protection under the Free Exercise Clause. At one point, the Court made a distinction between religious beliefs and actions, indicating that the government could never interfere with belief or opinion, but could always regulate practices. *Untied States* v. *Reynolds*, 98 U.S. 145, 166 (1878). This distinction did not hold, as the Court has provided protection for such religious conduct as soliciting contributions, *Cantwell* v. *Con-*

necticut, 310 U.S. 296 (1940), and of course, observing one's chosen Sabbath, *Sherbert* v. *Verner*, 374 U.S. 398 (1963), or refusing to work on armaments. *Thomas* v. *Review Board*, 450 U.S. 707 (1981).

There remains the question of which religious conduct may not be burdened (and thus must be accommodated unless a compelling interest justifies it), by government action. One theory would draw the line between actions that are compelled or dictated by religious belief and those that are merely motivated or influenced by these beliefs. "Not all actions are necessarily required (duties) or forbidden (sins); religion addresses what is 'better' as well as what is 'good.' M. McConnell, *Accommodation of Religion*, [1985] S. Ct. Rev. 1, 27 (discussing permissive rather than mandatory accommodation).

The most expansive view of the Free Exercise Clause would be to scrutinize any governmental burden on any activity that is arguably religious and require a balancing test between the government's interest and the burden on the activity. However, the Supreme Court has never gone so far, especially in the context of the public schools. The court has continued to struggle with the questions of which religious actions are protected and how significant the burden on that activity must be in order to trigger the strict scrutiny of the Free Exercise Clause. *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), held that the state's compulsory schooling requirement unduly burdened the free exercise of the religious beliefs of the Old Order Amish. The Court stressed that the Amish mode of life was "essential," "fundamental," and "central" to their religious beliefs and that their religious community would be gravely endangered if not destroyed by the state requirement. *Id.* at 218-219. While *Yoder* did not rest *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and was decided before *Thomas*, its language is considerably less expansive as to the exercise that should not be burdened than are those cases.

For me, the key fact is that the Court has almost never interfered with the prerogative of school boards to set curric-

ula, based on free exercise claims. *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), may be the only case, and even there a specific affirmation was required, implicating a non-religious First Amendment basis, as well.

From a common sense view of the work "burden," *Sherbert* and *Thomas* are very strong cases for plaintiffs. In any sensible meaning of a burden, the burden in our case is greater than in *Thomas* or *Sherbert*. Both of these cases involved workers who wanted unemployment compensation because they gave up jobs based on their religious beliefs. Their actual losses that the Court made good, the acutal burden that the Court lifted, was one or two thousand dollars at most. Although this amount of money was certainly important to them, the Court did not give them their jobs back. The Court did not guarantee they would get any future job. It only provided them access to a sum of money equally with those who quit work for other "good cause" reasons.

Here, the burden is many years of education, being required to study books that, in plaintiffs' view, systematically undervalue, contradict and ignore their religion. I trust it is not simply because I am chronologically somewhat closer than my colleagues to the status of the students involved here that I interpret the choice forced upon the plaintiffs here as a "burden."

VI

However, constitutional adjudication, especially for a lower court, is not simply a matter of common sense use of words. We must determine whether the common sense burden on plaintiffs' religious belief is, in the context of public school curriculum, a constitutional "burden" on their religious beliefs.

I do not support an extension by this court of the principles of *Sherbert* and *Thomas* to cover this case, even though there is a much stronger economic compulsion exercised by public schooling than by any unemployment compensation system. I think the constitutional basis for those cases is sufficiently thin

that they should not be extended blindly. The exercise there was of a narrow sort, and did not explicitly implicate the purposes or methods of the program itself.

Running a public school system of today's magnitude is quite a different proposition. A constitutional challenge to the content of instruction (as opposed to participation in ritual such as magic chants, or prayers)[8] is a challenge to the notion of a politically-controlled school system. Imposing on school boards the delicate task of satisfying the "compelling interest" test to justify failure to accommodate pupils is a significant step.[9] It is a substantial imposition on the schools to *require* them to justify each instance of not dealing with students' individual, religiously compelled, objections (as opposed to *permitting* a local, rough and ready, adjustment),[10] and I do not see that the Supreme Court has authorized us to make such a requirement.

Our interpretation of these key phrases of our Bill of Rights in the school context is certainly complicated by the fact that the drafters of the Bill of Rights never contemplated a school system that would be the most pervasive benefit of citizenship for many, yet which would be very difficult to avoid. *See, e.g.*,

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[8] I agree with the court's opinion that it would be unconstitutional to force students to participate in what is, for them, a religious ritual contrary to their beliefs (Op. at p. 10)

[9] I do not think there is any evidence that actually accommodating pupils in practice need be as difficult as the state contends. Indeed, the state espouses a theory of rigidity (and finds alleged experts to support it) that seems a bit ludicrous in this age of individualized attention to many kinds of student language and interest. There was no evidence of actual confusion or disruption from the accommodation that did take place.

[10] In a dispute in Panama City, Florida, teachers of a "critical reading" approach specifically *allowed* students to opt-out of reading allegedly offensive books in English class. There the opt-out was a way to try to get the school board and objecting parents to allow the use of the books the teachers favored. *Washington Post*, January 4, 1987, Magazine section at pp. 10, 13-14.

Jernigan v. *State*, 412 So. 2d 1242 (Ala. 1984), for the criminal conviction of Catholic parents who lived too far from a Catholic school, and thus did not send their child to school.

The average public expenditure for a pupil in Hawkins County is about 20% of the income of the average household there. Even the modest tuition in the religious schools which some plaintiffs attended here amounted to about a doubling of the state and local tax burden of the average resident.[11] Had the Founders recognized the possibility of state intervention of this magnitude, they might have written differently. However, it is difficult for me to see that the words "free exercise of religion," at the adoption of the Bill of Rights, implied a freedom from state teaching, even of offensive material, when some alternative was legally permissible.[12]

Therefore, I reluctantly conclude that under the Supreme Court's decisions as we have them, school boards may set curricula bounded only by the Establishment Clause, as the state contends. Thus, contrary to the analogy plaintiffs suggest, pupils may indeed be expelled if they will not read from the King James Bible, so long as it is only used as literature, and not taught as religious truth. *See Abington School Dist.* v. *Schempp*, 374 U.S. 203, 325 (1963); *Donahoe* v. *Richards*, 38 Me. 379, 61 Am. Dec. 256 (1854). Contrary to the position of *amicus* American Jewish Committee, Jewish students may not assert a burden on their religion if their reading materials overwhelmingly provide a negative view of Jews or factual or historical issues important to Jews, so long as such materials do not assert any propositions as religious truth, or do not otherwise violate the Establishment Clause.

The court's opinion well illustrates the distinction between the goals and values that states may try to impose and those

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[11] See City and County Data Book, p. 515-16 (GPO, 1983); Statistical Abstract of United States, table 215 (GPO, 107th ed. 1987).

[12] As guaranteed by the Supreme Court's decision in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925).

they cannot, by distinguishing between teaching *civil* toleration of other religions, and teaching *religious* toleration of other religions (Op. at p. 20). It is an accepted part of public schools to teach the former, and plaintiffs do not quarrel with that. Thus, the state may teach that all religions have the same civil and political rights, and must be dealt with civilly in civil society. The state itself concedes it may not do the latter. It may not teach as truth that the religions of others are just as correct *as religions* as plaintiffs' own.

It is a more difficult question when, as here, the state presents materials that plaintiffs sincerely believe preach religious toleration of religions by consistent omission of plaintiffs' religion and favorable presentation of opposing views.[13] Our holding requires plaintiffs to put up with what they perceive as an unbalanced public school curriculum, so long as the curriculum does not violate the Establishment Clause. Every other sect or type of religious belief is bound by the same requirement. The rule here is not a rule just for fundamentalist dissenters, for surely the rule cannot be that when the school authorities disagree with non-fundamentalist dissenters, the school loses *(See e.g., Epperson* v. *Arkansas,* 393 U.S. 96 (1968), *Spence* v. *Bailey,* 465 F.2d 797 (6th Cir. 1972); *Edwards* v. *Aguilard,* 55 U.S.L.W. 4860 (June 19,1986)), and when the school authorities disagree with fundamentalists, the school wins *(See e.g., Mozert; Grove* v. *Mead School Dist.,* 753 F.2d 1528 (9th Cir. 1985); *Wright* v. *Houston Ind. School District,* 366 F. Supp. 1208 (S.D. Tex. 1972)). Rather, unless the Supreme Court chooses to extend the principle of *Thomas* to schools, the democratic principle must prevail.[14]

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[13] For example, they noted that of 47 stories referring to, or growing out of, religions (including Islam, Buddhism, American Indian religion and nature worship), only 3 were Christian, and none Protestant. A competing reader even bowdlerized the word "God" out of I.B. Singer's intensely religious stories. New York Times, August 2, 1987, Education Life, pp. 20-21.

[14] Plaintiffs are, of course, free to work politically and by education to change the school curriculum, just as others worked and succeeded in making the changes to which plaintiffs object.

Schools are very important, and some public schools offend some people deeply. That is one major reason private schools of many denominations—fundamentalist, Lutheran, Jewish—are growing.[15] But a response to that phenomenon is a political decision for the schools to make. I believe that such a significant change in school law and expansion in the religious liberties of pupils and parents should come only from Supreme Court itself, and not simply from our interpretation. It may well be that we would have a better society if children and parents were not put to the hard choice posed by this case. But our mandate is limited to carrying out the commands of the Constitution and the Supreme Court.

I therefore concur in the result and reverse the judgment of the District Court.

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[15] See B. Cooper, *The Changing Demography of Private Schools*, in 16 Education and Urban Society, 429-42 (Sage Publ. 1984) (Between 1965 and 1983, enrollment in Lutheran schools grew 35%; in Jewish schools 37%; in non-religious private schools 69% and in all non-catholic private schools over 130%, National Center for Educational Statistics (1983)); Charles Glenn (Massachusetts Director of Equal Educational Opportunity), *Phi Delta Kappan*, Feb. 1987, p. 452; U.S. Department of Education, Digest of Education Statistics, pp. 47-48.

CIV-2-83-40

MOZERT, *et. al.*
v.
HAWKINS COUNTY PUBLIC SCHOOLS, et al.

ORDER

FILED January 7, 1987.

Based on the foregoing stipulation, it is hereby ordered that the judgment amount entered on behalf of the Eaton family is corrected to $11,629.60.

Dated: December 31, 1986

/s/ Thomas G. Hull
THOMAS G. HULL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

No. Civ-2-83-401

BOB MOZERT, *et al.*
v.
HAWKINS COUNTY PUBLIC SCHOOLS, *et al.*

FILED December 18, 1986

MEMORANDUM AND ORDERS

This is a civil rights action, 42 U.S.C. § 1983, in which plaintiffs seek injunctive relief and money damages. On October 24, 1986, this Court found that the defendants had violated plaintiffs' first amendment rights to free exercise of religion and enjoined the defendants from requiring students to read the Holt, Rhinehart readers which plaintiffs found objectionable. Additionally, the Court dismissed plaintiffs' claim for damages against the individual defendants, but held that the Hawkins County Board of Education could be found liable. Subsequently, on December 15, 1986, this action came before the Court for determination of damages.

Initially, plaintiffs move the Court to join Leisha Frost, Rebecca Eaton, and Vickie Couch as party-plaintiffs. This motion is GRANTED; and it is so ORDERED.

Plaintiffs contend that, as a proximate result of the defendant school board's actions, they incurred extraordinary expenses which they are entitled to recover.[1] These expenses

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[1] Plaintiffs also contend that defendants' actions caused them to suffer emotional distress and injury to reputation. However, plaintiffs waived these claims at the hearing for damages.

include fees for tuition, books, registration, transportation, and lunches, which accrued, plaintiffs claim, because they were forced to attend alternative school programs. For example, Bob Mozert testified that as a direct result of defendant's unconstitutional acts, he enrolled his two children, Travis and Sundee, in the Kingsport City School System, where they attended from December 17, 1983 to June, 1986. Because they are not residents of Kingsport, the Mozerts paid $2,900.90 in tuition, whereas tuition had been free in Hawkins County Schools.

Additionally, Mr. Mozert testified that his family incurred extraordinary transportation costs of $1,512.00 in driving the children to the Kingsport school. Mr. Mozert also testified that in August 1986 his children began attending a private, Christian school and that the family has incurred additional expenses for tuition, registration, and transportation during the 1986 school year. Finally, Mr. Mozert claims that his family has expended an excess of $320.00 for school lunches since they began attending alternative schools. The Baker, Frost, Couch, Eaton, and Meade families all claim to have suffered similar expenses.

While stipulating that the plaintiffs incurred expenses in attending alternative schools, defendant argues that the plaintiffs failed to mitigate their damages. According to the school board, plaintiffs could have attended Rogersville City Schools much more cheaply than the Kingsport city or private, Christian schools they chose. Dr. Gray Peevley, superintendent of Rogersville City Schools, testified that plaintiffs could have attended Rogersville schools, none of which use the Holt, Rhinehart readers, without paying tuition. Furthermore, he testified that the cost of lunch was identical to Hawkins County schools.

Acknowledging that plaintiffs have a duty to mitigate damages, the Court finds, nevertheless, that Rogersville schools were not a viable alternative for the plaintiffs. For example, Mr. Mozert, Mrs. Baker, and Mrs. Frost all testified

that the Rogersville schools were located in an opposite direction from family employment areas. They testified that transporting the children to Rogersville would have caused extreme inconvenience and even more transportation costs. Therefore, after careful consideration the Court finds that plaintiffs would not have necessarily mitigated damages by attending Rogersville schools.

Next, defendants argue that requiring defendants to pay plaintiffs' tuition for alternative Christian schools is a violation of the Establishment Clause. Defendants cite *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973), in which the United States Supreme Court ruled that a New York statute which provided tuition reimbursements to parents of children attending non-public schools violated the Establishment Clause of the First Amendment. In ruling the law invalid, the *Nyquist* court established the following three-pronged test:

> [T]o pass muster under the Establishment Clause the law in question, first must reflect a clearly secular legislative purpose . . . second, must have a primary effect that neither advances nor inhibits religion . . . and, third, must avoid excessive government entanglement with religion. . . .

413 U.S. at 773. Citations omitted.

The Court first notes that in this instance we are not concerned with state law, state regulations, or even state custom. Instead, we are assessing an award of compensatory damages for injuries that proximately resulted from defendants' violation of the plaintiffs' constitutional rights. Plaintiffs do not seek prospective educational grants or reimbursements for expenses beyond October 1986, at which time the Court enjoined the defendants' unconstitutional acts. Plaintiffs merely seek compensatory damages for that time during which they were forced to choose between forfeiting their first amendment rights and seeking alternative education.

Defendants cite no precedent for the proposition that an award of compensatory damages, as opposed to state law,

should be measured against the three-pronged *Nyquist* test. Nevertheless, the Court finds that such an award does satisfy *Nyquist*. Undoubtedly, an award of damages serves a secular purpose in that it compensates the plaintiffs for costs flowing from violations of their Constitutional rights. Second, the primary effect of such an award is to compensate the plaintiffs for their losses, not to promote religious schools. In *Witters* v. *Washington Department of Services for the Blind*, 88 L.Ed 2d 846, 106 S. Ct. 748 (1986), for example, the Court unanimously held that the establishment clause does not preclude awarding state vocational assistance to a blind person studying at a Christian college to become a pastor. The Court found that the primary purpose of the vocational rehabilitation program was to promote the well-being of the visually handicapped, not to provide financial support for non-public, sectarian institutions.

> As far as the record shows, vocational assistance provided under the Washington program is paid directly to the student, who transmits it to the educational institution of his or her choice. Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.

88 L.Ed at 854.

In this case, plaintiffs were forced to seek alternative schools when defendants threatened expulsion unless plaintiffs read Holt readers. In the face of these threats, some plaintiffs chose to attend public schools and some chose private, Christian institutions. Since any amount of their contemplated award which might indirectly flow to Christian schools "does so only as a result of the genuinely independent and private choices" of these plaintiffs, the Court finds that the primary effect of the award is to compensate plaintiffs for their losses in attending alternative schools and not to advance or inhibit religious schools. As to the third prong of the *Nyquist* test, the Court finds that an award of damages for tuition expenses does not cause government entanglement with religion. Defendants will not be required to supervise the alternative schools or the disbursement of the damage award.

Finally, plaintiffs ask the Court to award transportation costs and lost wages which they incurred in pursuing this lawsuit. For example, the Baker family claims transportation expenses for traveling to the trial in Greeneville, for attending out-of-town depositions, and for traveling to Cincinnati to attend the appeal of this Court's summary judgment decision. In addition to similar transportation costs, the Whitakers also seek to recover wages they claim to have lost in attending the trial.

While the Court is not aware of any precedent for awarding such costs, the Court notes that the purpose of compensatory damages is to restore the victim to as good a position as he enjoyed prior to the violation. Since the Court finds that but for defendants' actions, the plaintiffs would not have been forced to vindicate their rights in a court of law, it necessarily follows that defendants' actions proximately caused plaintiffs to incur transportation expenses and lost wages. Therefore, the Court finds that these are recoverable elements of damages.

Accordingly, after careful consideration of the stipulated expenses and the adjustments and modifications stipulated during the course of the damages hearing, the Court finds that defendants actions did proximately cause injuries and expenses to the plaintiffs and, therefore, it is hereby ORDERED that judgment enter for the plaintiffs and against the defendant Hawkins County School Board in the following amounts: the Mozerts—$6,214.40; the Bakers—$5,528.90; the Whitakers—$524.00; the Frosts—$12,949.94; the Couches—$5,272.15; the Eatons—$10,619.60; and the Meades—$6,412.60.

ENTER:

/s/ Thomas G. Hull
THOMAS G. HULL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

Case Number: Civ-2-83-401

BOB MOZERT, *et. al.*
v.
HAWKINS COUNTY PUBLIC SCHOOLS, *et al.*

FILED December 18, 1986

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment enter for the plaintiffs and against the defendant Hawkins County School Board in the following amounts: the Mozerts—$6,214.40; the Bakers—$8,528.90; the Whitakers—$524.00; the Frost—$12,949.94; the Couches—$5,272.15; the Eatons—$10,619.60; and the Meades—$6,412.60.

/s/ Karl D. Saulpaw, Jr.
KARL D. SAULPAW, JR.
Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

No. Civ-2-83-401

BOB MOZERT, *et al.*
v.
HAWKINS COUNTY PUBLIC SCHOOLS, *et al.*

FILED October 24, 1986

MEMORANDUM OPINION

This is a civil rights action, 42 U.S.C. § 1983 seeking injunctive relief and money damages for the alleged violation of the plaintiffs' First Amendment right to the free exercise of religion. This controversy stems from the compulsory use of the 1983 edition of the Holt, Rhinehart and Winston basic reading series (Holt series) in the Hawkins County Public Schools. The plaintiffs, "fundamentalist" Christian school children and their parents, claim that their religion requires that they not be exposed to the Holt series because its contents are offensive to their religious beliefs. The relief sought by plaintiffs includes money damages for the expenses incurred in sending their children to private school and an order of the Court requiring the school system to accommodate their religious beliefs by providing alternative reading instruction.

It is important to note at the outset that the plaintiffs are not requesting that the Holt series be banned from the classroom, nor are they seeking to expunge the theory of evolution from the public school curriculum. Despite considerable fanfare in the press billing this action as "Scopes II", it bears little relation to the famous "monkey trial" of 1925. These plaintiffs simply claim that they should not be forced to choose between

reading books that offend their religious beliefs and foregoing a free public education.

The defendants, including intervening defendant, Dr. Robert McElrath, Commissioner of Education for the State of Tennessee, take the position that broad state interests preclude the fashioning of educational alternatives for the plaintiffs. They contend that any attempt to provide acceptable textbooks for the plaintiffs would violate the Establishment Clause of the First Amendment through excessive state entanglement with religion.

This action juxtaposes two of our most essential constitutional liberties—the right to free exercise of religion and the right to be free from a religion established by the state. Moreover, it implicates an important state interest in the education of our children. The education of our citizens is essential to prepare them for effective and intelligent participation in our political system and is essential to the preservation of our freedom and independence. *See, Wisconsin* v. *Yoder*, 406 U.S. 205 (1972).

I.

BACKGROUND

In January 1983, pursuant to state law,[1] a textbook selection committee was appointed by the Hawkins County school district to select a basic reading series to be used from kindergarten through the eighth grade. After evaluating several series of textbooks over a number of months, the committee recommended purchase of the Holt series. This recommendation was unanimously approved by the Hawkins County Board of Education (Board) at its regular meeting on May 12, 1983. The books were purchased, and the Hawkins County schools began using them at the start of the 1983 school year.

Before the first month of school passed, however, plaintiff Vicki Frost, who had three children attending the Hawkins

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[1] T.C.A. § 49-6-2207.

County public schools, discovered that the sixth grade reading textbook contained material that offended her family's religious beliefs. Mrs. Frost and a friend, Jennie Wilson,[2] organized a meeting which was held September 1, 1983, at the Church Hill Middle School. At this meeting, which was attended by two Hawkins County school principals, Mrs. Frost, Mrs. Wilson and others objected to the sixth grade reading textbook.

In September 1983, a group of Hawkins County residents, including most of the plaintiff-parents, formed an organization named Citizens Organized for Better Schools (COBS). Members of COBS spoke at regularly scheduled school board meetings on September 8, October 13, and November 10, 1983, objecting, among other things, to the use of the Holt series. The COBS members apprised the Board that they found the Holt series offensive to their religious beliefs and presented petitions requesting removal of the Holt series from the schools.

At various times during the Fall of 1983, six plaintiff-families[3] contacted Mr. Salley, principal of Church Hill Middle School, and requested that their children be provided with alternative reading arrangements. Principal Salley apparently acceded to the requests, and seven plaintiff-students at Church Hill Middle School were provided alternative reading arrangements.[4] Two other plaintiff-students were provided alternative arrangements at two separate elementary schools in the district.[5]

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[2] Mrs. Wilson is apparently the grandmother of plaintiffs Heather and Vicky Baker.

[3] The Frost, Mozerts, Whittakers, Eatons, Couches and Marshalls.

[4] The arrangements varied from child to child. Usually the teacher would assign a passage from another reader, and the student would go to another room to read.

[5] Sarah Frost at Church Hill Elementary School and Samuel Couch at Mt. Carmel Elementary School.

The Meads and the Bakers, two other plaintiff-families, sought alternative reading arrangements for their children at Carter's Valley Elementary School. Principal MacMillan refused a proposal for an alternative text, and no alternative arrangements were allowed.

Despite presentations by two plaintiff-parents, the Board unanimously adopted, without discussion, a resolution requiring teachers to "use only textbooks adopted by the Board of Education as regular classroom textbooks"[6] at the November 10, 1983, school board meeting. In compliance with this resolution, school officials at Church Hill Middle School told seven of the student-plaintiffs that they would no longer be allowed to use an alternative reader. At that point, these students refused, on religious grounds, to read the Holt series or to attend the reading classes in which the Holt series was used. They were suspended from school for three days as a result. On November 22, 1983, they were again suspended, this time for ten (10) days, because they continued to refuse to attend reading class and/or read the Holt books.[7] Following this rigorous enforcement of the Board's mandate, many of the student-plaintiffs withdrew from public schools and enrolled in private, Christian schools.

Plaintiffs filed this suit on December 2, 1983. On March 15, 1983, this Court granted summary judgment in favor of defendants. This Court found that the plaintiffs' religious beliefs were sincere and that certain passages in the Holt series might be offensive to them, but that, because the books appeared neutral on the subject of religion, they did not violate the plaintiffs' constitutional rights. *Mozert* v. *Hawkins County Public*

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[6] Joint Stipulation of Fact (Court File No. 205 at ¶44).

[7] On December 8, student-plaintiffs then Gina Marshall and student-plaintiff Travis Mozert were suspended a third time, for an additional ten (10) days. Gina Marshall was allowed to return to school before the third suspension period ended and was not required to read the Holt series.

Schools, 582 F. Supp. 201, 202 (E.D. Tenn. 1984), *rev'd*, 765 F.2d (6th Cir. 1985).

The Sixth Circuit reversed this finding and remanded, instructing this Court to determine whether the defendants infringed on the plaintiffs' free exercise rights, whether a compelling state interest would justify such infringement if any, and whether a less restrictive means could accommodate both plaintiffs and defendants without running afoul of the Establishment Clause. *Mozert* v. *Hawkins County Public Schools*, 765 F.2d at 78 (6th Cir. 1985).

With the agreement of the parties, the Court determined that the issue of liability should be decided by the Court without intervention of a jury and that the issue of damages would be tried by a jury at a later date if necessary. The hearing on the issue of liability began on July 14, 1986. Based upon the evidence and testimony offered at trial, and the record as a whole, the Court makes the findings of fact and conclusions of law which follow.

II.
BURDEN

"When deciding a free exercise claim, the courts apply a two-step analysis. First, it must be determined whether the government action does, in fact, create a burden on the litigant's exercise of his religion. If such a burden is found, it must then be balanced against the governmental interest, with the government being required to show a compelling reason for its action." *Mozert*, 765 F.2d at 78. In addition, it must be determined whether the state has acted in a way which constitutes "the least restrictive means of achieving [the] compelling state interest," as measured by its impact upon the plaintiffs. *Thomas* v. *Review Board*, 450 U.S. 707, 718 (1981).

The plaintiffs assert the free exercise rights of both the students and the parents, who assert that their religion compels them not to allow their children to be exposed to the Holt series. Plaintiffs have also alleged that the Board's policy inter-

feres with the inherent right of the parents to "direct the upbringing and education of children under their control. . . ." *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534 (1925), *see also*, *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972).

In deciding whether plaintiffs' free exercise rights have been impermissibly burdened by the state, the Court must first determine whether the beliefs are religious and whether they are sincerely held by the individual asserting them. "[T]o have the protection of the Religion Clauses the [plaintiffs'] claims must be rooted in religious belief," *Yoder*, at 215; and, although the truth of a belief "is not open to question, there remains the significant question whether it is 'truly held.'" *U.S.* v. *Seeger*, 380 U.S. 163, 185 (1965).

Fortunately for the Court, these subtle threshold determinations were made prior to trial. The parties stipulated both that the plaintiffs' beliefs were religious and that they were sincerely held. Joint Stipulation 9. However, before the Court may turn to the issue of whether the exercise of these beliefs is burdened by the Board's requirement that all students read from the Holt series, the defendants would have the Court decide whether these beliefs are central to the plaintiffs' faith. The defendants argue that unless the beliefs are central to the plaintiffs' faith, they are not entitled to protection under the Free Exercise Clause of the First Amendment.

In making this assertion, the defendants rely on certain language in *Yoder*, *supra*, in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and also on two Sixth Circuit cases. *Lakewood Ohio Congregation of Jehovah's Witnesses, Inc.* v. *City of Lakewood, Ohio*, 699 F.2d 303 (6th Cir. 1983), *cert. denied*, 464 U.S. 815 (1983); and *Sequoyah* v. *Tennessee Valley Authority*, 620 F.2d 1159 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980).

In *Yoder*, the Court found that compulsory school attendance past the age of 14 "contravenes the *basic* religious tenets and practices of the Amish faith." (emphasis added). *Yoder*, *supra* at 218. In *Sherbert*, the Court found that in refusing to work on Saturday, a Seventh-Day Adventist followed a "*cardinal* prin-

cipal of her religious faith." (emphasis added). *Sherbert* at 406. In both of these cases, the Court did note that the belief or practice at odds with a state regulation was one of utmost importance to, or about which their [sic] was no disagreement within, the plaintiff's religion.

However, at no point did the Court hold that such a finding must be made in order to prevail on a free exercise claim. Rather, as mentioned above, the concern appears to be simply that the belief or action be rooted in religion. *Accord, Thomas* v. *Review Board, supra,* at 713. That Saturday worship is a "cardinal" principal of the Seventh Day Adventist religion simply makes it easy to find that the belief is religious. No Supreme Court decision has turned on the issue of whether a particular belief was central to the believer's faith. The two Sixth Circuit cases relied upon by defendants also support he "rooted in religion" standard and do not mandate a judicial determination of the relative doctrinal significance of the beliefs at issue.

In *Lakewood,* the desire to construct a church building on the particular parcel of land zoned residential had absolutely no basis in the congregation's faith. Their religion did not compel them to build a church on that parcel of real estate. Indeed, the court determined that the building of a church, either in the residential district or anywhere else, had no religious or ritualistic significance for the Jehovah's Witnesses. Thus, it is clear that no evaluation was made by the court of the importance of the alleged religious action for which protection was sought. The case turned upon the fact that the act of building a church was not "integrally related" to any underlying religious belief of the plaintiffs.

In *Sequoyah,* certain Cherokee Indians sought to enjoin the flooding of the Little Tennessee River because it would destroy sacred burial grounds which some felt compelled to visit and/or preserve. Although the court stated that the claim of centrality of the land to the practice of the traditional Cherokee religion was missing, 620 F.2d at 1164, the case turned upon the fact

that the plaintiffs' objections were based primarily upon a fear that their cultural heritage would suffer if these "sacred" grounds were lost. "The overwhelming concern of the [plaintiffs] appears to be related to the historical beginnings of the Cherokees and their cultural development." *Id.*

The plaintiffs believe that they must not allow their children to be exposed to the content of the Holt series. The Court is of the opinion that it should determine whether this belief is essentially religious and not whether it is a central tenent of the plaintiffs' faith. And this determination should be made despite the fact that many people holding more orthodox religious beliefs might find the plaintiffs' beliefs inconsistent, illogical, incomprehensible, and unacceptable. Based on the stipulations of the parties and the proof offered at trial, therefore, the Court FINDS that the plaintiffs' beliefs are sincerely held religious convictions entitled to protection under the Free Exercise Clause of the First Amendment.

The parties have stipulated that the plaintiffs find certain material in the Holt series offensive to their beliefs. Joint Stipulation 55. Testimony at trial reinforced this position. The representative plaintiff-parents clearly testified that the material objected to was offensive "in the context of the Holt series." The plaintiffs perceive certain objectionable themes running throughout the Holt series. For example, the Holt series contains a definite feminist theme,[8] and the plaintiffs have a religious objection to stories which appear to denigrate the differences between the sexes.

It appears to the Court that many of the objectionable passages in the Holt books would be rendered inoffensive, or less offensive, in a more balanced context. The problem with the Holt series, as it relates to the plaintiffs' beliefs, is one of degree. One story reinforces and builds upon the others throughout the individual texts and the series as a whole. The

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[8] There is no question that the reading texts teach more than just how to read.

plaintiffs believe that, after reading the entire Holt series a child might adopt the views of a feminist, a humanist, a pacifist, an anti-Christian, a vegetarian, or an advocate of a "one-world government".

Plaintiffs sincerely believe that the repetitive affirmation of these philosophical viewpoints is repulsive to the Christian faith—so repulsive that they must not allow their children to be exposed to the Holt series. This is their religious belief. They have drawn a line, "and it is not for us to say that the line [they] drew was an unreasonable one." *Thomas*, *supra*, at 715.

Having made these findings, we must determine whether the state's action has burdened plaintiffs' free exercise of their religious beliefs. The applicable test was set forth in *Thomas*, *supra*, at 717-18: "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, . . . a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."

In *Thomas*, a Jehovah's Witness resigned his employment on religious grounds after his employer transferred him to a department that manufactured armaments. The state denied unemployment compensation benefits. The Supreme Court held that this violated his free exercise rights because it put pressure on the plaintiff to either violate his religious beliefs or forego the otherwise available public benefit.

In *Sherbert*, a Seventh-Day Adventist refused to work on Saturdays because of her religious convictions. Following her discharge, the state denied her unemployment compensation benefits. The Supreme Court, based upon the reasoning subsequently used in *Thomas*, held that this violated her free exercise rights.

In *Spence* v. *Bailey*, 465 F.2d 797 (6th Cir. 1972), a high school student, who had a religiously based conscientious objection to

war, refused to attend state required ROTC training.[9] The school refused to award Spence a diploma. The Sixth Circuit held that this violated his free exercise rights "since it compels the conscientious objector either to engage in military training contrary to his religious beliefs, or to give up his public education." *Id.* at 799.

In *Moody* v. *Cronin*, 484 F. Supp. 270 (C.D. Ill. 1979), Pentecostal children refused to participate in co-educational physical education classes because of their religious objection to exposure to the opposite sex in "immodest attire." The school mandated that they attend these classes "under penalty of suspension, expulsion, denial of credits for graduation, and other discipline." *Id.* at 272. Based upon reasoning like that applied in *Spence*, the district court found that the children's free exercise rights had been violated. *Cf.*, *Grove* v. *Mead School Dist. No. 354*, 753 F.2d 1528 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 85 (1985).[10]

On the basis of the foregoing, it seems hardly possible to question the fact that the plaintiffs' free exercise rights have

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[9] The state required every student to take one year of physical education or ROTC. No physical education classes were offered for males at Spence's high school. He was thus faced with state requirement that he attend ROTC.

[10] In *Grove*, a student objected on religious grounds to reading *The Learning Tree*, which was assigned in her high school English literature class. Her teacher assigned another book and allowed her to leave the room during discussion of the offensive text. The student and her mother brought suit seeking removal of the book from the school, alleging that it violated the student's free exercise rights as well as the Establishment Clause. Because the school allowed her the option of foregoing exposure to the offensive text, the court found that there was no coercion against her free exercise rights. "Plaintiffs allege that they believe 'eternal consequences' result to them and their children from exposure to *The Learning Tree* or discussion of it. That allegation would probably be sufficient to present a free exercise question if Cassie Grove had been compelled to read the book or be present while it was discussed in class." (Canby, J., concurring at 1541-2).

been burdened. Plaintiffs' religious beliefs compel them to refrain from exposure to the Holt series. The Board has effectively required that the student-plaintiffs either read the offensive texts or give up their free public education. This case is clearly in line with *Thomas*, *Sherbert*, and their progeny. Accordingly, the Court FINDS that the plaintiffs' free exercise rights have been burdened by the school board policy.

"The mere fact that the [plaintiffs'] religious practice is burdened by a governmental program does not mean that an exemption accommodating [their] practice must be granted. The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest." *Thomas* at 718. Whether that burden is impermissible or not will turn on the discussion to follow.

III.

STATE INTEREST

The state interest implicated in this action is its interest in the education of its young. In order for a state's interest to justify uniform application of a regulation which burdens an individual's free exercise rights, it must be "compelling," *Thomas*, "overriding," *U.S.* v. *Lee* 455 U.S. 252, 258 (1982), "of the highest order," *Yoder* at 215, and "especially important," *Bowen* v. *Roy*, ____ U.S. ____ (1986) (O'Connor, J. concurring in part and dissenting in part, Slip. Op. No. 780 at 5).[11]

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[11] Defendants have indicated that in a case such as the present action, challenging the denial of otherwise uniformly provided benefits, a lesser showing of state interest may be required. This is based upon the Chief Justice's opinion in *Bowen*. Chief Justice Burger's opinion was the opinion of the Court in that case, but it is the majority opinion only so far as parts I and II are concerned. It is in part III that the pronouncements relied upon by the defendants are found. Part III of the opinion finds accord with only two other members of the court. Chief Justice Burger states therein that, when a government regulation "indirectly and incidentally calls for a choice between securing a government benefit and adherence to religious beliefs," *Bowen*, Slip Op. at 12, "the Government meets its burden when it

No party disputes that the state's interest in education meets these various tests. Providing public schools ranks at the very apex of the function of a state. *Yoder, supra* at 213.

However, in the instant case, the state, acting through its local school board, has chosen to further its legitimate and overriding interest in public education by mandating the use of a single basic reading series. The Court has found that compulsory use of this reading series burdens the plaintiffs' free exercise rights. In order to justify this burden, the defendants must show that the state's interest in the education of its children necessitates the uniform use of the Holt reading series —that this uniformity is essential to accomplishing the state's goals. Therefore, the Court must decide whether the state can achieve literacy and good citizenship for all students without forcing them to read the Holt series.

It seems obvious that this question must be answered in the affirmative. The legislative enactments of this state admit as much. Although Tennessee has manifested its compelling interest in education through its compulsory education law, it has, by allowing children to attend private schools or to be taught at home, also acknowledged that its interests may be accomplished in other ways and may yield to the parental interest in a child's upbringing. Moreover, the fact that the state has approved several basic reading series for use in the Tennessee public schools tells us something of the expendability of any particular series.

In insisting upon the necessity of uniformity, the defendants point to legitimate concerns about the difficulty of administering an alternative reading program. The Court agrees that

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demonstrates that [the] challenged [regulation] . . . , neutral and uniform in application, is a reasonable means of promoting a legitimate public interest." *Id.* at 14. This Court finds itself in agreement with Justice O'Connor, who notes that the test enunciated by the Chief Justice "has no basis in precedent." (O'Connor, J. concurring in part and dissenting in part at 4).

uniformity would make the testing, grading, and teaching of reading more manageable. However, it is clear from the evidence at trial that the state's interest in uniformity is by no means absolute. Many of the expert educators who appeared at trial indicated that teaching is best accomplished through individualized instruction.[12]

The defendants also insist that any accommodation of the plaintiffs is impossible. This position is based, in part, on the plaintiffs' lists of objections to the Holt series. Exhibits 22-37. It is true that many of the plaintiffs' objections suggest that other elements of the curriculum besides the reading program could easily be considered offensive to their beliefs. However, as indicated earlier, it is the Court's perception that the plaintiffs have drawn a line in regard to their religiously mandated action. The Holt series is on one side of the line as intolerable, and apparently the balance of the books and school curriculum remain, at this point, on the other side of the line. The plaintiffs have not made multi-subject, multi-text objections; they have objected to the Holt reading series. The defendants may not justify burdening the plaintiffs' free exercise rights in this narrow case on the basis of what the plaintiffs might find objectionable in the future.

Moreover, proof at trial demonstrated that accommodating the plaintiffs is possible without materially and substantially disrupting the educational process. *See, Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 509 (1969). The students at the middle school were provided with

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[12] Mrs. Evelyn Rodriguez, who has taught elementary school in Hawkins County for ten or eleven years, testified that she not only divides her reading class into two or three groups by reading level, but that she always uses additional texts and materials other than the basic reader. As much as possible, she works with the students on their individual reading level, particularly if a child is below grade level in reading skills. In addition, children requiring special instruction in reading leave the classroom during the reading period and go to a reading lab.

an alternative reading arrangement for a period of several weeks. There was no testimony at trial that those arrangements resulted in any detriment to the student-plaintiffs. In fact, those children still received above average grades for that period. Even after the School Board mandate, compromise arrangements were worked out with some of the plaintiffs.[13]

A related concern of the defendants is that if plaintiffs are allowed an alternative, the Court will have "opened the floodgates" to a barrage of such requests. The state argues that "[t]o permit individual teachers, students, parents or ministers to choose the textbook of their liking would inescapably result in widespread chaos not only within the Hawkins County School System but also every public school system within the State of Tennessee."[14]

While this is a very legitimate concern, such a scenario seems unlikely to occur. Proof at trial indicated that objections such as those of the plaintiffs have never, to the memory of Hawkins County school officials, been raised in the past. Dr. J. Gordon Melton testified that, although there are a variety of sects in and around Hawkins County, the area is relatively

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[13] Steve Whittaker was allowed to return to school after the suspensions and continue reading from an alternative book until the first of the year. Thereafter, Steve participated with the rest of his class upon the assurance from his teacher "that she wouldn't put emphasis on the stories that were objectionable to us and violated our religious beliefs." TR. at 925. His teacher also wrote notes about some stories on Steve's worksheets such as, "Don't believe what's in the content of this story." *Id.* at 926. The Whitakers could not afford to send Steve to a private school.

Gina Marshall was allowed to return to school after the suspensions without participating in the Holt series. She simply worked on English in the accompanying workbook. Her teacher put an "x" through the portions dealing with stories from the Holt series.

[14] Pretrial Brief of defendant Robert McElrath, Commissioner of Education of the State of Tennessee, at 9.

homogeneous from a religious standpoint.[15] Accommodating the beliefs of the small group of students involved in this case probably would not wreak havoc in the school system by initiating a barrage of requests for alternative materials.

While the Court must be sensitive to the widespread implications of its decisions, it must also limit its decisions to the facts of the case before it. *Bender* v. *Williamsport Area School District*, ___ U.S. ___ (March 25, 1986). The case before the Court is a narrow one. The plaintiffs are objecting, on religious grounds, to the mandated use of the Holt series in the Hawkins County public schools. The Court has already found that the plaintiffs' sincerely held religious beliefs are burdened by the defendants' requirement. In order for the plaintiffs to be entitled to any judicial relief, the court must also find that no compelling state interest justifies this burden on the plaintiffs and that the state's interests can be served by less restrictive means. The proof at trial overwhelmingly supports such a finding.

Accordingly, the Court FINDS further that, while the State of Tennessee has a compelling and overriding interest in the education of its children and the literacy of its citizens, this interest can be accomplished by less restrictive means. The uniform, compulsory use of the Holt series in the Hawkins County public schools is by no means essential to furthering the state's goals.

IV.

INJUNCTIVE RELIEF

Given these findings, the Court must now consider the plaintiffs' demand that they be afforded alternative reading texts and the defendants' concern that such relief would violate the Establishment Clause.

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[15] TR. at 1552, 1555. Churches in the area are primarily protestant.

Evidence at trial indicated that providing alternative texts would require additional preparation by existing teachers or the hiring of part-time reading tutors. However, it was clear that this accommodation could be achieved without substantially disrupting the education process and without substantially inconveniencing either the plaintiff-students or the rest of the the student body. Moreover, such an accommodation might promote a spirit of religious tolerance in the school system and impress upon the student body the high regard this society has for religious freedom.

On the other hand, considerable evidence indicated that no single, secular reading series on the state's approved list would be acceptable to the plaintiffs without modifications. Reading assignments might have to be tailored to the plaintiffs' needs, and the average reading teacher might not readily recognize those portions of the texts which offend the plaintiffs' beliefs. The defendants are rightly concerned that any accommodation of the plaintiffs in the schools would have the effect of advancing a particular religion and would involve an excessive entanglement between the state and religion. *See, Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). It is hard to imagine any reading program for the plaintiffs offered at the schools which would not present Establishment Clause problems.

Under these circumstances, the Court FINDS that a reasonable alternative which could accommodate the plaintiffs' religious beliefs, effectuate the state's interest in education, and avoid Establishment Clause problems, would be to allow the plaintiff-students to opt out of the school district's reading program. The State of Tennessee has provided a complete opt-out, a total curriculum alternative, in its home schooling statute. T.C.A. §49-6-3050. The Court perceives that this alternative could also work effectively for a single subject. Allowing the student-plaintiffs to opt out of reading class would relieve the school system of any burden that would have been caused by providing alternative teaching arrangements and would relieve the plaintiffs of the burden on their religious freedom. Although it will require extra effort on the part of the plaintiff-

parents, these parents have demonstrated their willingness to make such an effort as the price of accommodation in the public school system.

As the Court envisions the opt-out program, each of the student-plaintiffs would withdraw to a study hall or to the library during his or her regular reading period at school and would study reading with a parent later at home. The home schooling portion of the child's education would be proportionally subject to the provisions of the statute. T.C.A. § 49-6-3050 (b). The child's reading proficiency would be rated by the standardized achievement tests used by the state. If deficiencies develop, the parents and school officials should confer to facilitate improvement. The Court finds that these children are bright and capable of completing such a program without serious detriment to their reading skills or citizenship. The specifics of this program will best be developed by the professional educators and the parents.

The home schooling opt-out does not contravene the Establishment Clause. There is neither state sponsorship, financial support, nor active involvement of the sovereign in religious activity. This holding is in accordance with *Spence*, *supra*, and *Moody*, *supra*, which granted similar relief without an Establishment Clause problem.

Accordingly, the defendants are hereby ENJOINED from requiring the student-plaintiffs to read from the Holt series and ORDERED to allow the student-plaintiffs to attend the Hawkins County public schools without participating in the course of reading instruction, as long as the parents submit written notice of their intent to provide home school reading instruction in accordance with T.C.A. § 49-6-3050. During the normal reading period, the student-plaintiffs shall be excused from the classroom and provided with suitable space in the library or elsewhere for a study hall. No student shall be penalized for exercising this option.

This opinion shall not be interpreted to require the school system to make this option available to any other person or to

these plaintiffs for any other subject. Further accommodations, if they must be made, will have to be made on a case-by-case basis by the teachers, school administrators, Board, and Department of Education in the exercise of their expertise, and failing that, by the Court.

V.

DAMAGES

Finally, we turn to the individual defendants' assertion that their good faith immunity bars the plaintiffs' claim for damages. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). The standard for invoking the good faith defense is objective, not subjective.

In the case at bar, where Free Exercise rights clash with Establishment Clause protections, considerable doubt existed to whether the defendants' actions violated clearly established constitutional rights. This Court's initial appraisal of the situation was that the constitution did not protect the plaintiffs from exposure to offensive ideas and that the Board was not in violation of the plaintiffs' rights as long as the Holt series was neutral on the subject of religion. While the application of the sequential reasoning required by the Sixth Circuit's on remand has now lead the court to a different conclusion, the individual defendants cannot be expected to have anticipated this ruling and must be accorded good faith immunity from money damages.

Accordingly, the plaintiffs' claim for damages against defendants Cloud, Bailey, McKee, Elkins, Silvers, Price, Dykes, and Salley is hereby DISMISSED.

The Clerk will notify the parties of the date for a hearing on damages against the Hawkins County Board of Education.

VI.

SUMMARY

In summary, the Court has made the following findings of fact and conclusions of law:

(1) The plaintiffs have sincerely held religious beliefs which are entitled to protection under the Free Exercise Clause of the First Amendment and which are offended by certain recurring themes in the Holt series.

(2) In forcing the plaintiff-students to read from the Holt series or to forfeit a free public education, the defendants have burdened the plaintiffs' right of free exercise of their religion.

(3) The State of Tennessee and the Hawkins County Board of Education have a legitimate, compelling, and overriding interest in the education of public school students; but this interest does not necessitate uniform use of the Holt series and can be achieved by less restrictive means.

(4) For this reason, the plaintiffs' civil rights have been violated, and they are entitled to both injunctive relief and money damages.

(5) The defendants cannot accommodate the plaintiffs' needs within the context of the school system without risk of violating the Establishment Clause of the First Amendment.

(6) The plaintiffs are therefore entitled to opt out of the Hawkins County public school reading program while still enjoying the benefit of the rest of the curriculum (with appropriate provisions for home instruction according to state law).

(7) The individual defendants are protected from any financial liability to the plaintiffs on the basis of their qualified good faith immunity.

(8) And finally, the plaintiffs are entitled to a hearing on damages, to be assessed against the Hawkins County School Board, for any harm the plaintiffs may have suffered as a proximate result of the Board's interference with their First Amendment rights.

ENTER:

/s/ Thomas G. Hull
THOMAS G. HULL
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 84-5317

BOB MOZERT, et al.,
Plaintiffs-Appellants,

v.

HAWKINS COUNTY PUBLIC SCHOOLS, *et al.,*
Defendant-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

DECIDED AND FILED JUNE 18, 1985

Before: LIVELY, Chief Judge, KEITH, Circuit Judge; and WEICK, Senior Circuit Judge.

WEICK, Senior Circuit Judge. Appellants, consisting of certain Hawkins County school children and their parents, appeal from the granting of summary judgment by the district court and the dismissal of their amended complaint which alleged that their rights were unconstitutionally infringed by the enforcement of appellee Hawkins County Board of Education's policy of requiring all public elementary school students to read in class textbooks published by Holt, Rhinehart and Winston (Holt). In our opinion, as hereinafter pointed out, there were sufficient disputed issues of fact not resolved to make it erroneous for the district court to grant summary judgment. We therefore reverse and remand for the district court to conduct an evidentiary hearing and to adopt findings of fact and conclusions of law.

I.

In 1983, the Hawkins County Board of Education approved the use of the Holt textbook as a reading primer for its elementary school system. Appellants, who are fundamentalist Christians, brought an action in the United States District Court for the Eastern District of Tennessee, under 42 U.S.C. § 1983, to enjoin the Board and its administrators from compelling their children to participate in classes which used the Holt primer and to instead permit them to have their own separate reading classes with a different "non-offensive" reading primer. The complaint alleged that the Holt books contained teachings which were contrary to their fundamentalist beliefs and that their religion forbade them from reading such contrary teachings. Appellants emphasized that they were not seeking to ban the Holt books from the schools nor did they object to its use by the rest of the student body.

Appellees moved, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss appellants action for failure to state a legally cognizable claim upon which relief can be granted. In support of this motion, appellees submitted an affidavit by appellee Hawkins County School Superintendant Bill Snodgrass in which he defended the decision to use the Holt books. Snodgrass stated his belief that the books were very instructive and attractive and they substantially enhanced reading skills. He warned that if the appellants were permitted to opt out of the regular reading program and to hold their own alternative classes "teachers would have no control over the management, they could not possibly teach skills in sequential order and the teaching-learning process would become completely unmanageable chaos."

Appellants subsequently filed an amended complaint which more specifically set out their reasons for objecting to the Holt books. They claimed that the books were offensive to their religious beliefs because: (1) they teach witchcraft in violation of Biblical precepts against such teaching; (2) they teach that certain values, held to be absolute by appellants, are relative

depending upon the situation; (3) they teach that it is proper to be disobedient to parents, despite Biblical precepts to the contrary; (4) they teach that idol worship may be beneficial and that prayer to a horse god may have helped to end World War II, despite the Biblical prohibition against idol worship and belief; (5) they teach that one can achieve salvation simply by having faith in the supernatural without necessarily believing in Jesus; (6) they teach that Jesus needed the help of Jewish scribes to write his story—thus implying that Jesus was illiterate—despite the fact that the Bible says that Jesus was literate and that his story was written by non-Jews; (7) they teach that man evolved from the common ancestors of monkeys in contradiction of the creation story in the Bible; (8) they teach "humanism, . . . one world concepts [and] antinationalism"—values which are contrary to those possessed by appellants.

On December 9, 1983, a hearing was held before the district court. Several of the appellants testified about their objections to the Holt books. The books themselves were introduced into evidence. At the conclusion of the hearing, the court announced that it would defer ruling on appellants' injunction request until the record was further developed. On January 10, 1984, the court advised the parties that it would reach a final decision by January 30 and that, unless they objected, it would treat their respective pleadings as cross-motions for summary judgment.

Appellees filed an answer to appellant's amended complaint on January 11, 1984. In their answer, appellees denied, for lack of information, the assertion contained in the complaint that appellants' religious beliefs were sincerely held and that exposure to the Holt books offends these beliefs. Appellees admitted as true appellants' allegation that the students who refused to read the textbooks were suspended from school. However, they denied appellants' assertion that there were suitable alternative books which could have been made available to those students or that they had rebuffed appellants' pleas for alternative books. On January 16, 1984, appellees filed a new motion to dismiss and, in the alternative, for summary

judgment. Appellees also sought protection from appellants' discovery requests until these motions were ruled upon.

On January 30, 1984, appellants notified the court that they desired a trial in this matter and that they needed to depose several witnesses in order to properly respond to appellees' motions. Appellants requested that the court hold an oral hearing prior to disposing of the motions. Appellants moved for a continuance until April 4, 1984.

The court issued an order, on February 15, 1984, prohibiting further discovery until a hearing on the motions could be held. The hearing was set for February 24, 1984. On that date, the court granted appellees' motion to dismiss except as to appellants' fifth allegation (that the books teach that one does not necessarily have to believe in Jesus in order to achieve salvation). The fifth allegation, the court stated, may state a constitutional violation if the appellants can show that the books actually asserted that salvation or some form of religion is necessary or that no religion is necessary. With regard to the other allegations, the court held that they did not assert that the books taught that a particular faith or that no religious faith is necessary and, therefore, did not make out a valid First Amendment claim.

Appellants filed a memorandum with the court, on March 12, 1984, addressing their allegation that the books teach that belief in Jesus is unnecessary for one to achieve salvation. They cited an essay written by Thomas J. Murphy, Holt's Senior Vice President for its school book division, which was published in the teacher's edition of one of the Holt books. In this essay, Murphy noted that school reading programs involve more than simply the teaching of reading skills but also the shaping of students' ethical values. He contrasted the values of the reading books used previously in the schools with the new Holt books. The former, he indicated, "emphasized a Judeo-Christian values system in a most direct way" while the latter emphasized the need for students "to have a sense of themselves as participants in a national and world community; to

understand and to be mindful of the richness of our diversity." Appellants alleged that these statements show that the Holt authors rejected the traditional Judeo-Christian values and sought to teach contrary values. Appellants also cited several examples in the books themselves which they claim support their contention, including readings which discuss, without disapproval, Chinese, Islamic and Buddhist philosophy.

On March 15, 1984, the court dismissed the remaining allegation, pursuant to Fed. R. Civ. P. 56(b). The court indicated that it found no evidence that the Holt books instructed children, one way or the other, on the need to believe in Jesus in order to achieve salvation. While conceding that appellants' religious beliefs were sincerely held and that the Holt books contain passages which might be offensive to them, the court, nevertheless, held that there was no constitutional violation because the books were neutral on the subject of religion, "neither advocating a particular religious belief nor expressing hostility to any or all religions." The court also denied appellants' request for an additional hearing. From these orders of dismissal, appellants have appealed to this court.

II.

The district court dismissed all but one of the claims in appellants' complaint, pursuant to Fed. R. Civ. P. 12(b)(6). The remaining claim was dismissed on summary judgment, pursuant to Rule 56. However, it is clear from the district court's memorandum on its Rule 12(b)(6) dismissals that the court considered the affidavits, testimony and other evidence in the record. Under Rule 12(b), when matters outside the pleadings are presented to the court, and not excluded, a motion to dismiss for failure to state a claim is treated as one for summary judgment. *Sequoyah* v. *Tennessee Valley Authority*, 620 F.2d 1159, 1161 (6th Cir. 1980), *cert. denied*, 449 U.S. 953. Accordingly, both of the orders dismissing appellants' claims will be treated as grantings of summary judgment.

Summary judgment may be granted only if there is no genuine issue with respect to the material facts of the case. *County*

of Oakland v. *City of Berkley*, 742 F.2d 289, 297 (6th Cir. 1984). In ruling on a motion for summary judgment, the court must construe the evidence in the light most favorable to the party opposing the motion. *Adams* v. *Union Carbide Corp.*, 737 F.2d 1453 (6th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S. Ct. 545. Further, the papers supporting the movant are closely scrutinized, whereas the non-movant's are treated indulgently. *Id.* Bearing these considerations in mind, we turn to appellants' claim that the required participation in the Holt reading program violates their right to the free exercise of religion.

When deciding a free exercise claim, the courts apply a two-step analysis. First, it must be determined whether the government action does, in fact, create a burden on the litigant's exercise of his religion. If such a burden is found, it must then be balanced against the governmental interest, with the government being required to show a compelling reason for its action. *Bob Jones University* v. *United States*, 461 U.S. 574, 603 (1983); *Sequoyah* v. *Tennessee Valley Authority*, 620 F.2d at 1163.

In the instant case, appellants have asserted that their religious beliefs are sincerely held and that the Holt books present ideas which oppose and/or contradict these beliefs. They contend that their religion requires that they not be exposed to such beliefs. They further allege that the appellant-children were required to participate in the Holt reading program and that refusal to participate would lead to expulsion. Appellees have denied that appellants' religious beliefs were sincerely held and that exposure to the Holt books offends such beliefs. A factual issue is, therefore, presented as to whether appellees infringed on appellants' free exercise rights. This issue must be resolved on remand by the district court with appropriate findings of fact and conclusions of law.

As noted above, the state can permissibly impose a burden on an individual's free exercise rights if the state has a compelling justification for doing so. Appellees insist that their inter-

est in teaching reading to the elementary school students under their charge is just such a compelling interest which would justify the burden imposed on appellants. Further, they argue that to accommodate appellants' demands would require them to violate the First Amendment's establishment clause. Appellants, on the hand, insist that their opt-out proposal would not impair appellees' ability to teach reading since appellees would still be permitted to teach reading with the Holt books to the rest of the student body and appellants would still be required to learn the very same reading skills as the other students, albeit with an alternative book. Again, there is a factual dispute which precludes disposition of the issue on summary judgment. A remand is, therefore, necessary for the district court to make factual findings and conclusions of law on this issue as well as to permit reasonable discovery if requested.

The judgment of the district court is reversed and the case remanded for further proceedings as hereinbefore ordered.

The court expresses no opinion on the merits of the plaintiffs' claims or those of the defendants as we have considered only the procedural posture of the case under Rule 56, Federal Rules of Civil Procedure.

UNITED STATES DISTRICT COURT
EASTERN OF TENNESSEE,
NORTHEASTERN DIVISION

Civ-2-83-401

BOB MOZERT, *et. al.*
v.
HAWKINS COUNTY PUBLIC SCHOOLS, *et al.*

☐ Jury Verdict. This actions came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

JUDGMENT IN A CIVIL CASE

FILED March 15, 1984

IT IS ORDERED AND ADJUDGEDthat in light of the fact that the plaintiffs have been unable to show this Court any part of any book, or anything about the books taken as a whole, that could impinge on the constitutional rights of the plaintiffs, this action is hereby DISMISSED. Rule 56(b), Federal Rules of Civil Procedure.

/s/ Thomas G. Hull
THOMAS G. HULL
/s/ Karl D. Saulpaw, Jr.
KARL D. SAULPAW, JR.
Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

No. Civ-2-83-401

BOB MOZERT, *et al.*
v.
HAWKINS COUNTY PUBLIC SCHOOLS, *et al.*

FILED March 15, 1984

MEMORANDUM AND ORDER

Plaintiffs, Hawkins County, Tennessee school children and their parents, have filed this civil rights action, 42 U.S.C. § 1983, objecting to the fact that Hawkins County public school children are taught to read from the Holt Basic Readings, published by Holt, Rhinehart, and Winston. They claim that the compulsory use of these texts, from the first to the eighth grade, violates their right of free exercise of religion and the fundamental right of parents to control the religious and moral instruction of their children.

By order of February 24, 1984, this Court limited plaintiff's allegations to the only one it considered to possibly state a constitutional claim. This allegation, that the books in question teach that one does not need to believe in God in a specific way, but that any type of faith in the supernatural is an acceptable method of salvation, was considered to state a claim only if the books were asserting either that salvation, or some form of religion, was necessary, or that no religion was necessary. In other words, the test would be whether the books were neutral on the issue of religion, or violating this neutrality either by advocating a particular religion or by being anti-religion.

The plaintiffs were directed to specify to the Court exactly which parts of the books substantiated their allegation. They have now responded, and it is clear that the books neither instruct the children that they must be saved, nor that they do not need any form of religion. The plaintiffs do not suggest otherwise. What they object to is the underlying philosophy of the readers, taken as a whole, which is geared to making the school children better participants in the world community. The books are aimed at fostering a broad tolerance for all of man's diversity, in his races, religions and cultures. They intentionally expose the readers to a variety of religious beliefs, without attempting to suggest that one is better than another. The illustrations chosen by the plaintiffs in their brief are very apt. Both appear in the eight grade reader, *Great Waves Breaking*.

The first example is a poem entitled "The Blind Men and the Elephant" by John Godfrey Saxe, described as a Hindu fable. It appears on page 408. The poem described six blind men who each feel a portion of an elephant and reach a conclusion of what the whole must be like on the basis of their limited experience. The last two stanzas read:

> And so these men of Indostan
> Disputed loud and long,
> Each in his own opinion
> Exceeding stiff and strong,
> Though each was partly in the right
> And all were in the wrong!
>
> Moral
> So oft in theologic wars,
> The disputants, I ween,
> Rail on in utter ignorance
> Of what each other mean,
> And prate about an Elephant
> Not one of them has seen!

The plaintiffs correctly reach the obvious conclusion that this poem means that each religion described God from its own limited vantage point, based on its incomplete revelation, and

that all are only partly right and partly wrong. While that is no doubt the meaning of the poem, there is nothing in the book to suggest that all should subscribe to this way of thinking. The poem is presented for what it is worth. In the context of the readers taken as a whole, however, it does indeed illustrate the type of religious tolerance presumably requisite to the ideal "world citizen."

The second illustration, found on page 387, is from the classic story, *The Diary of Anne Frank*. In the scene selected, Anne is talking to Peter Van Daan.

> Anne: (Softly.) I wish you had a religion, Peter.
> Peter: No, thanks! Not me!
> Anne: Oh, I don't mean you have to be Orthodox . . . or believe in heaven and hell and purgatory and things . . . I just mean some religion . . . it doesn't matter what. Just to believe in something! When I think of all that's out there . . . the trees . . . and flowers . . . and seagulls . . . when I think of the dearness of you, Peter . . . and the goodness of the people we know . . . Mr. Kraler, Miep, Dirk, the vegetable man, all risking their lives for us every day . . . When I think of these good things, I'm not afraid anymore . . . I find myself, and God, and I. . .
>
> (PETER interrupts, getting up and walking away.)

Unlike the poem about the elephant, the *Diary of Anne Frank*, as a whole, cannot be interpreted to be making a statement about the equal validity or invalidity of all religions, although this passage, taken out of context, can be so read. Nonetheless, this illustration does support the plaintiffs' contention that the books, as a whole, tend to instill in the readers a tolerance for man's diversity.

It is this underlying philosophy that offends the plaintiffs who believe that Jesus Christ is the only means of salvation. Plaintiffs reject for their children any concept of world community, or one-world-government, or human interdependency. They also strongly reject any suggestion, by implication, that all religions are merely different roads to God, finding this an

(5) teach that one does not need to believe in God in a specific way but that any type of faith in the supernatural is an acceptable method of salvation;

(6) depict a child who is disrespectful of his mother's Bible study;

(7) imply that Jesus was illiterate;

(8) teach that man and apes evolved from a common ancestor; and

(9) teach various humanistic values.

The plaintiffs' position, in essence, is that their first Amendment freedom to believe as they choose is meaningless if the state can force their children to read books that contain ideas and values to which they do not subscribe. They seek, *inter alia*, the right of the student plaintiffs to "opt out" by reading from some other state-approved texts and an injunction which would prohibit Hawkins County from compelling the students to be present in any class or any room where the *Holt Basic Readers* are read from, recited from, or in which their contents are discussed.

The complaint contains no allegation that the defendants are attempting to coerce the school children into performing any symbolic act, subscribing to any particular value, or professing any particular form of belief. The plaintiffs' assertion appears to be that the mere exposure to this broad spectrum of ideas and values which they find offensive amounts to a constitutional violation.

This Court is of the opinion that only claim 5 [that the books teach that one does not need to believe in God in a specific way but that any type of faith in the supernatural is an acceptable method of salvation], may state a constitutional violation. This would only be the case if the books appear to assert that salvation or some form of religion is necessary at all or that no religion is necessary. The plaintiffs have yet to specify to this Court exactly which parts of which books substantiate this claim.

In this highly diverse nation, it is not uncommon that a group of people will form a sincere and passionate distaste for a particular set of textbooks chosen by an apparently well-meaning board of education. In *Williams* v. *Board of Education of the County of Kanawha*, 388 F. Supp. 93 (D. W. Va. 1975), aff'd 530 F.2d 972 (4th Cir. 1975), a group of parents of public school children brought an action challenging the chosen textbooks as containing "both religious and anti-religious materials, matter offensive to Christian morals, matter which invades personal and familial morals, matter which defames the nation and which attacks civic virtue, and matter which suggests and encourages the use of bad English." *Id.* at 95. The Kanawha County plaintiffs, like those in this action, alleged that the use of these textbooks was a violation of their First Amendment right to free exercise of their religion. After an evidentiary hearing, the *Williams* court concluded that the materials were genuinely offensive to the beliefs of the plaintiffs but that, as a matter of law, there was nothing in the defendant's conduct that constituted an inhibition of, or prohibition of, the free exercise of religion. About the plaintiffs' rights of free exercise of religion it wrote:

> These rights are guaranteed by the First Amendment, but the Amendment does not guarantee that nothing about religion will be taught in the schools or that nothing offensive to any religion will be taught in the schools. . .
>
> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion. . .
>
> By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. *Id* at 96, 97.

No basic constitutional values are implicated in the allegation that *Holt Basic Readings* depict witchcraft, the worship of idols, situational ethics, disrespect for parents, the theory of evolution, or the values of humanism. None of these allegations suggest a departure from the constitutionally mandated neutrality between religion and religion and between religion and non-religion. The First Amendment does not protect the plaintiffs from exposure to morally offensive value systems or from exposure to antithetical religious ideas. Only if the plaintiffs can prove that the books at issue are teaching a particular religious faith as true (rather than as a cultural phenomenon), or teaching that the students must be saved through some religious pathway, or that no salvation is required, can it be said the mere exposure to these books is a violation of free exercise rights.

Accordingly, it is ORDERED that the defendants' motion to dismiss, Rule 12 (b) (6), Federal Rules of Civil Procedure, is hereby GRANTED in part and DENIED in part. The plaintiffs' claim is hereby limited to its fifth allegation as indicated above.

ENTER:

/s/ Thomas G. Hull
THOMAS G. HULL
UNITED STATES DISTRICT JUDGE

(2)

Supreme Court, U.S.
FILED
JAN 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1100

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BOB MOZERT, *et al.*,
Petitioners,

v.

HAWKINS COUNTY PUBLIC SCHOOLS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF AMICI CURIAE OF CHRISTIAN LEGAL SOCIETY AND THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the State burdens the free exercise of religion and the right of parents to direct the moral upbringing of their children when public school officials suspend children for refusal to read material that violates their parents' and their own sincerely held religious beliefs.

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as some eight million Catholic students attend public schools in this country.[4] It is an unfortunate fact that the education provided Catholic children in public schools sometimes undermines both parental authority and religious belief.

The Catholic League firmly believes that it is unconstitutional for a state school to require children, despite the objections of their parents, to study material which the parents sincerely believe undermines the religious beliefs of the children. The League therefore supports the judgment of the district court granting the parents the right to exempt their children from studying religiously objectionable material and opposes the contrary decision of the court of appeals.

The Christian Legal Society is a non-profit professional association of 4,000 judges, attorneys, law professors and law students, founded in 1961. The Center for Law and Religious Freedom is a division of the Christian Legal Society founded in 1975 to protect the free exercise of religion, supporting the appropriate accommodation by the State for religious beliefs and practices and the respect for religious rights as required by the First Amendment, thus strengthening the individual citizen's respect for, and allegiance to, our constitutional government.

Amici have been involved in cases involving the right of parents to exempt their children from curricular material that violates their religious beliefs. The Christian Legal Society assisted the lawyers representing two students who refused to read a book that contained a detailed description of a prostitute's work, as well as profanity and blasphemy. The school board denied the students' request for an alternative assignment and threatened to

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[4] This statistic is based on an estimate of 900,000 children baptized as Catholics each year (hence 10,800,000 total Catholic children in grades one through twelve), with 2,800,000 children attending Catholic elementary and high schools. Of the 8,000,000 children in public school, half are registered in programs of Catholic instruction outside the public school. *See generally The Official Catholic Directory 1986* (General Summary); 1986 *Catholic Almanac* 440-41.

withhold their diplomas. After the students threatened suit, the school district agreed to allow them to graduate. The League represented a student who was denied her diploma for three years, after her parents removed her from a class that contained material to which they objected on religious grounds. After a suit was filed in federal court, the school district awarded the diploma. *Bender* v. *School District of Menomonee Falls*, Civ. 85-C-0811 (E.D.Wis. filed May 28, 1985).

The letters from the parties consenting to the filing of this brief are submitted herewith to the clerk pursuant to Rule 36.1.

SUMMARY OF ARGUMENT

Contrary to the decision below, a burden exists on the First and Fourteenth Amendment rights of these parents and their children in four distinct, but interrelated, ways. First, the State has forced these parents and schoolchildren to forfeit a public education, an important governmental benefit, or disobey the precepts of their religion. See *Hobbie v. Unemployment Appeals Commission*, 480 U.S. ——, 107 S. Ct. 1046 (1987); *Thomas v. Review Board*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963). Second, the State has interfered with the transmission of parental values, a fundamental liberty protected by the Fourteenth Amendment and, when the values at stake are religious, by the First Amendment. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). Third, the State has violated the absolute right of freedom of belief, including the individual's right to be free from coercive state influence in shaping his beliefs and ideas. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *West Virginia v. Barnette*, 319 U.S. 624 (1943); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Fourth, contrary to the explicit assumption of the court below, the record indicates that the State expected children to read *aloud* materials that violated their religious beliefs, burdening

both their freedom of religion and freedom of expression. See *Barnette, supra*; *Wooley v. Maynard*, 430 U.S. 705 (1977). The existence of private schools does not relieve public school officials of their responsibility to respect the religious values of the parents and children in their community.

The decision below upsets the equilibrium generally established in the lower courts that controversial curricular material to which parents express religious objections should be accompanied by the option of performing alternative assignments. By upsetting this balance, the decision below will affect the rights of parents nationwide and increase divisiveness in communities, by forcing dissenting parents to seek to control public education or abandon it entirely.

ARGUMENT

I. WHEN THE STATE SUSPENDS SCHOOLCHILDREN FOR REFUSAL TO READ MATERIAL THAT VIOLATES THEIR PARENTS' AND THEIR OWN RELIGIOUS BELIEFS, THE STATE BURDENS THE FREE EXERCISE OF RELIGION AND THE RIGHT OF PARENTS TO DIRECT THE RELIGIOUS VALUES OF THEIR CHILDREN.

The issue presented by this case appears on first impression to be whether parents with overzealous religious convictions should be allowed to legally object to a portion of the public school curriculum. A closer reading reveals a case of valid constitutional dimensions, namely, insensitivity of the State to its obligation to reasonably accommodate parents concerned about the preservation of religious values in their young children, when the State cannot justify its coercive requirements by a compelling state interest unachievable by less drastic means.

The facts of this case are important for what is not at issue. The parties stipulated that the religious beliefs of the parents and children in this case were sincerely held. The parties further stipulated that the reading of the Holt, Rinehart and Winston basal reading series offends

those sincerely held religious beliefs. The record is clear that five children were suspended from school for a total of 13 days each, and two children were suspended for a total of 23 days each, for refusing to read from the Holt readers. Faced with continued suspensions, several of the parents finally placed their children in private schools; some children were sent to public schools in a neighboring school district, where the parents paid tuition; some children were taught at home. However, one student remained in the Hawkins County School District, because his parents were financially unable to pay for, and were physically unable to transport him to, other schools.[5] School authorities told a first grader to leave the system, despite the fact that her parents, who were objecting to her brother's reader, were not objecting to her reader. The record also indicates that at least one of the students received an "F" in *oral* reading, for refusing to read *aloud* from the Holt readers.[6] Despite these facts, the court below held that no burden had been placed on the parents' and children's religious beliefs.

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[5] The record seems to indicate that the teacher of the student continued to accommodate to some degree his religious beliefs, despite the school board policy prohibiting any accommodation.

[6] The court below states that "there is no proof in the record that any plaintiff student was required to engage in role play . . . [or] read aloud." Petition Appendix (hereinafter "Pet. App.") at 16a; *but see, id.* at 12a. To the contrary, Vicky Frost testified that her daughter Sarah Frost was given an "F" in *oral* reading, for refusing to read the Holt readers aloud. Joint Appendix, Vol. 3 at 506. The trial court did not mention this specifically in its decision, since it was not necessary to its decision. Given that the lynchpin of the appellate decision below seems to rest on the mistaken belief that the plaintiffs were not required to read aloud materials that offended their religious beliefs, at a minimum, the case should be remanded to the district court for clarification of this point. A remand is not necessary if, as *amici* argue, a burden exists apart from a requirement on the children to read aloud from the Holt readers.

A. The State Has Burdened The Free Exercise Rights Of The Parents And Their Children By Forcing Them Either To Forfeit A Public Education, An Important Governmental Benefit, Or To Abandon Their Religious Convictions.

Although public education is not a federal constitutional right, *Plyler v. Doe*, 457 U.S. 202 (1982), it is an extremely important benefit provided by the State to all citizens who wish to attend its schools. See *id.* at 221-23; *Yoder*, 406 U.S. at 213 ("Providing public schools ranks at the very apex of the function of a state."); *Brown v. Board of Education*, 347 U.S. 483, 493 (1954); *see also*, Tenn. Const. art. 11, sec. 12.

On penalty of suspension, the Hawkins County School District requires children to read the Holt readers, despite their parents' determinations that the repetitious presentation of certain themes in the Holt readers violates their religious convictions. Contrary to the decision below, *Sherbert v. Verner*, 374 U.S. 398 (1963), and its progeny control the analysis of the burden in this case. As this Court has said:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Thomas v. Review Board, 450 U.S. at 717-18 (1981). *Accord, Hobbie v. Unemployment Appeals Commission*, 107 S. Ct. at 1048-52 (1987). The court below distinguished *Sherbert*, *Thomas*, and *Hobbie* from the instant case on the mistaken assumption that the governmental compulsion to engage in conduct proscribed by one's religious convictions was missing in this case, because Hawkins County school officials did nothing more than force

children to read material that violated their religious convictions.

However, mere statement of the reasoning of the court below shows its fallacy. Reading is more than "mere exposure"; " 'reading requires an affirmative act.' " *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 128 (1973), *quoting*, *Banzhaf v. FCC*, 405 F.2d 1082, 1100 (1968), *cert. denied*, 396 U.S. 842 (1969). See page 15, *infra*. The Hawkins County school officials have fulfilled the *Sherbert* elements of burden by compelling, on pain of suspension, conduct proscribed by the religious beliefs of these parents and their children, *i.e.*, reading material that repeatedly contradicts the young children's religious beliefs.[7]

Furthermore, the state compulsion against these parents and children is more egregious than the compulsion found in *Sherbert*, *Thomas*, and *Hobbie*. For in those cases, private employers forced the direct choice between private jobs and religious beliefs, with the State placing only an indirect burden on the individuals' religious conduct. In contrast, in this case, the State itself has placed a direct burden on the religious beliefs of the parents and their children, by forcing the direct choice between public education and religious beliefs.

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[7] As the district court decision, Pet. App. at 67a, and Judge Boggs' concurring opinion, Pet. App. 32a-36a, underscore, the parents and children are willing to accept occasional exposure to offensive material but cannot accept the repetition in the Holt reader of themes that violate their religious beliefs. The court below redefined the religious beliefs of the parents to suggest a situation in which they would not tolerate any discrepancy between the curriculum and their beliefs. Although these parents' objections sometimes seem tenuous, the court below decided a hypothetical case rather than the case that was actually before it.

B. The State Has Burdened The Right Of These Parents To Direct The Education And Religious Values Of Their Children, By Requiring Their Children To Read The Holt Readers, Despite The Parents' Sincerely Held Religious Belief That The Holt Readers Will Negatively Influence Their Young Children's Religious Values.

Few rights can be as important to parents as the right to direct the religious values and education of their children, as this Court repeatedly has affirmed. *Yoder*, 406 U.S. at 213-14 ("The values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society."); *Pierce*, 268 U.S. at 534 (affirming "the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Meyer*, 262 U.S. at 399 (the Fourteenth Amendment protects certain fundamental liberties, including "the right . . . [to] establish a home and bring up children, to worship God according to the dictates of his own conscience"). The parental right to direct the education of one's children is a fundamental liberty protected by the Fourteenth Amendment, which derives additional protection from the First Amendment guarantees of free exercise of religion and freedom of expression when religious values are at stake.

Under our system of liberties, the family is the primary vehicle for the preservation and transmission of values from one generation to the next generation. "[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (Powell, J., plurality opinion) (footnote omitted).

The Court has long recognized that the transmission of familial values is a vital, if delicate, function to be protected from state intrusion. "[B]y cultivating and trans-

mitting shared ideals and beliefs", families "foster diversity and act as critical buffers between the individual and the power of the State." *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984). Indeed, the right of parents to direct the child's values, which includes protecting the child from exposure to material that the parents consider harmful, has justified state action limiting expression that otherwise would have been protected by the First Amendment. See *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 749 (1978) (parental interest in protecting children from indecent language); *Rowan v. Post Office*, 397 U.S. 728, 738 (1970) (parental interest in protecting children from erotic mail); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (parental interest in protecting children from indecent material).[8]

---

[8] Strong practical considerations underly this commitment to the parental right to direct the education and values of their children. First, the preservation and transmission of parental values is integral to many parents' decisions to marry and bear children. Probably the greatest challenge and most satisfaction for parents derive from seeing their children internalize the parental values as their own. Second, development of healthy children is advanced by protection of the parental right to direct their education and religious values. Our legal system presumes that parents desire to act in the best interest of their children. *Parham v. J.R.*, 442 U.S. 584, 602 (1979). The parent has the unique opportunity to observe the child on a long-term and intimate basis, thereby acquiring special knowledge of the child's psychological, emotional and spiritual needs, which persons outside the family are less able to appreciate. Furthermore, the family provides a setting in which the child can develop his value system at a pace appropriate to him individually, without being subjected to societal pressure that could overwhelm him without the buffer of the family. See *Roberts*, 468 U.S. at 619. Third, protection of the parental right to direct the child's education and religious values strengthens the institution of the family by reinforcing parents' feelings of adequacy to nurture and socialize their children and provide for their basic needs. Finally, society benefits from the pluralism and diversity that results from protection of the parental right to direct the child's education and religious values. See Colby, *When the Family Does Not Pray Together: Religious Rights Within the Family*, 5 Harvard Journal of Law and Public Policy 39, 62-66 (1982).

As in this case, the landmark cases affirming the right of parents to direct the education and religious values of their children have arisen out of disputes between parents and state educational officials over children's participation in curricular content that violated the religious beliefs of the parents and the children. In *Yoder*, the Court required the State to exempt from the compulsory attendance laws children in ninth and tenth grades, when their parents for religious reasons did not want their children exposed to a curriculum that possibly would foster attitudes in the children incompatible with the religious beliefs of the parents. 406 U.S. at 211-12. In *Barnette, supra*, the Court required a partial exemption from the public school curriculum for children of religious dissenters who objected to their children saluting the flag. As the Establishment Clause decisions affirm, parents send their children to public school with the expectation that their religious beliefs will not be coercively influenced by the public school curriculum. *See, e.g., Edwards v. Aguillard*, 107 S. Ct. 2573, 2577 (1987).

Despite weighty justifications for the educational programs at issue, the parental rights cases consistently have subordinated the State's educational objectives to the right of parents to direct the education and religious values of the child. See *Meyer*, 262 U.S. at 401 (State prohibited teaching modern foreign language to children, arguing that immigrant children were not learning English and would, therefore, be unable to participate in civic duties); *Pierce*, 268 U.S. at 524-28 (State required all children to attend public schools, citing the rise in juvenile crime, the rise in religious divisiveness possibly attributable to "the separation of children along religious lines during the susceptible years of their lives," the need of immigrant children to learn English and democratic ideals, and a fear of future internal dissensions and foreign dangers); *Barnette*, 319 U.S. at 625 (State required the flag salute to instill patriotism during war); *Yoder*, 406 U.S. at 221 (State required universal compulsory education to prepare its future citizens to participate in

its political system and to be self-sufficient). Hawkins County's asserted interest in all children being forced to read from the Holt readers pales in comparison to these more substantial, yet insufficiently compelling, state interests.

The interest asserted below by Hawkins County school officials, i.e., exposing all children to values that the State believes important and that it fears parents may not choose to teach their children, has been asserted, and rejected, in other parental rights cases. Brief of Appellants Hawkins County Public Schools, in Court of Appeals, at 39. Despite persistent efforts by the State to standardize its diverse citizenry through various educational programs, this Court repeatedly has protected parents and their children against state efforts that, intentionally or unintentionally, might undermine the family's religious values. Standardization is not to be the goal or result of the American educational system. See *Meyer*, 262 U.S. at 402 (State officials are not allowed to educate the young "in order to submerge the individual and develop ideal citizens"). The Court in *Barnette* disparaged the State's interest in compelled uniformity in the public schools:

> "Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men . . . . As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing . . . . Compulsory unification of opinion achieves only the unanimity of the graveyard.
>
> "We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes.

319 U.S. at 640-42.

By failing to recognize any burden on the right of parents to protect their children's religious values, the court below undermined this fundamental liberty in favor of the coerced uniformity repeatedly disavowed by this Court.

C. The State Has Burdened The Right Of The Individual To Be Free From Coercive State Influence On The Individual's Beliefs.

The freedom to believe is absolute. *Cantwell v. Connecticut*, 310 U.S. at 303. The State may not "invade[] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control". *Wooley v. Maynard*, 430 U.S. at 715, *quoting*, *Barnette*, 319 U.S. at 642.

Even if compelled reading of repetitive themes offensive to children's religious beliefs were "mere exposure" to ideas, it would constitute a burden on the freedom of the individual to shape his own beliefs free from coercive state influence. As this Court has made abundantly clear, the State has no power to coercively influence the ideas of the individual. "For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State". *Abood v. Detroit Board of Education*, 431 U.S. at 235, *citing*, *Cantwell v. Connecticut*, 310 U.S. at 303-304. See *Stanley v. Georgia*, 394 U.S. 557, 565-66 (1968) ("State . . . control [of] the moral content of a person's thoughts . . . is wholly inconsistent with the philosophy of the First Amendment").

This Court has recognized the parental interest in protecting the child from exposure to materials that could interfere with the values that the parent is teaching the child. See *Pacifica*, 438 U.S. at 749; *Rowan*, 397 U.S. at 738; *Ginsberg*, 390 U.S. at 639. In those cases, the sender of the offensive material was a private entity;

how much more must the right not to receive offensive ideas be protected when the sender is the State.

This parental interest in protecting the child from state interference with familial values has been protected in the public education context when the beliefs potentially affected are religious beliefs of children. See *Grand Rapids v. Ball*, 473 U.S. 373, 385 (1985) ("the right of each individual voluntarily to determine what to believe (and what not to believe) free of any coercive pressures from the state"); *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985). In *Yoder*, the parents' basic concern was to protect their children's religious values from exposure to ideas in the public school curriculum that might influence their children's religious beliefs. *Yoder*, 406 U.S. at 211-12.[9] The heart of the *Barnette* decision is that public education officials are not free to influence children through curricular material to which the children and their parents have religious objections:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

Barnette, 319 U.S. at 642.

Protection against coercive state ideological input is particularly important when the individual is a "captive audience" of the State's message, who cannot avoid the message "simply by averting [his] eyes", *Cohen v. California*, 403 U.S. 15, 21 (1971), or throwing the material in the wastebasket, *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 542 (1980). In the public education context, the compulsory attendance laws

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[9] *Yoder* cannot be limited to protection only of Amish beliefs without violating the Establishment Clause guarantee that all religious faiths have equal weight before the government. Nor can it stand for the proposition that religious objections are protected only if the parents want a complete opt-out of public schools, since *Barnette* teaches that an opt-out of one part of the curriculum is not only permissible but required.

dissenters out of the public schools, citing its interest in homogeneity, and uses the existence of private schools to rationalize its intolerance of the religious views of these parents and students. While the existence of private education is an important constitutional right, private schools do not exist to relieve public education officials of their responsibility to respect *in practice* the religious beliefs of all in the community.[10]

Students holding dissenting religious values are not to be "ghettoized" or forced into private schools against their choice. This would send "a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Wallace v. Jaffree*, 472 U.S. at 69 (1985) (O'Connor, J., concurring).[11]

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[10] Curiously, the court below relied heavily on the existence of private schools to support its conclusion that no burden existed on the rights of the parents or students. The existence of alternative education is irrelevant to the issue of whether a burden exists but is a consideration only after the State has demonstrated a compelling state interest in forcing the children to read the Holt series. Then the existence of private schools becomes relevant in determining the least restrictive means of accomplishing the State's compelling interest.

[11] As this case demonstrates, for many parents, the local public schools have distinct advantages over private or home schooling. The parents in this case incurred expenses of over $50,000 in sending their children to alternative schools. At least one student's family could not financially afford, or physically transport the student to, an alternative school. Public schools often offer a greater variety of courses, extracurricular activities, and educational resources. No private school in general accord with the parents' religious views may exist in a community; and homeschooling requires one parent to be home during the day, which excludes families where the parent is single or both parents hold jobs outside of the home.

II. THE DECISION BELOW HAS NATIONAL IMPLICATIONS FOR PARENTAL INVOLVEMENT IN PUBLIC EDUCATION.

Parental involvement in the public schools has always been viewed as not only a right but a positive good for the educational system. See United States Department of Education, *What Works* 19 (1986) (citing several studies emphasizing the importance of parental involvement). Unfortunately, some school officials prefer absolute control to shared responsibility and decisionmaking. *Cf.*, *Barnette*, 319 U.S. at 638 ("There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution").

The courts have long recognized the value of allowing students with religious objections to curricular material to be exempted from material that violates their religious beliefs and allowed to study alternative material.[12] The decision below upsets this equilibrium at a time when both schools and individual teachers, under claims of

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[12] *Spence v. Bailey*, 465 F.2d 797 (6th Cir. 1972) (high school student who objects to R.O.T.C. training on religious grounds must be exempted); *Moody v. Cronin*, 484 F. Supp. 270 (C.D.Ill. 1979) (student who objected on religious grounds to participation in mandatory coeducational physical education class, because of "immodest" attire worn by other students, exempted). *See also, Grove v. Mead*, 753 F.2d 1528 (9th Cir.), *cert. denied*, 106 S. Ct. 85 (1985) (student could not challenge use of book in the curriculum to which she had religious objections, when she had been exempted from reading it); *Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980) (holiday curricular recognition of religious holidays upheld where students allowed exemption, stating that forced participation would violate the Free Exercise Clause); *Wright v. Houston Indep. Sch. Dist.*, 486 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974) (curricular inclusion of evolutionary theory upheld with opt-out provision); *Roman v. Appleby*, 558 F. Supp. 449 (E.D. Pa. 1983) (rejecting suit alleging that guidance counselor undermined student's religious beliefs, noting that student was not forced to attend sessions); *Smith v. Ricci*, 89 N.J. 514, 446 A.2d 501 (N.J.), *appeal dismissed sub nom., Smith v. Brandt*, 459 U.S. 962 (1982) (state regulation requiring sex education in elementary and secondary grades that allows students to be excused

academic freedom, increasingly are including controversial material in the curriculum.[13] Although the parents' concerns in this case may seem unusual to some, the holding that there is no burden will affect situations in which the cause for parental objections is obvious. As a practical matter, the decision below stands for the proposition that there is "no limitation on [the school board's] power to require any curriculum, no matter how offensive or one-sided, and to expel those who will not study it, so long as it does not violate the Establishment Clause." Pet. App. at 31a (Boggs, J., concurring.)

The constitutional right of exemption serves as a practical balance of interests, when increasingly it is recognized that the issue is not whether education will be value-laden but whose values public education will reflect.

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from specific lessons that violate their parents' religious beliefs upheld); *Citizens for Parental Rights v. San Mateo County Board of Education*, 51 Cal. App. 3d 1, 124 Cal. Rptr. 68 (1st Dist., 1975), *appeal dismissed*, 425 U.S. 908 (1976) (sex education programs with parental notification and excusal provisions upheld); *Hobolth v. Greenway*, 52 Mich. App. 682, 218 N.W. 2d 98 (Mich. 1974) (state statute permitting sex education but requiring excusal upheld); *Medieros v. Kiyosaki*, 52 Hawaii 436, 478 P.2d 314 (Haw. 1970) (elementary sex education program that allowed excusal upheld). *Contra Davis v. Page*, 385 F. Supp. 395 (D.N.H. 1974) (school need not excuse children from classes in which audio-visual material and "wordly music" was used, despite parents' religious objections).

[13] Controversial materials and methods are not uncommon in the public school classroom. See pages 2-3, *supra; see also, e.g., Dean v. Timpson Indep. School Dist.*, 486 F. Supp. 302 (E.D.Tex. 1979) (teacher's classroom use of survey regarding sexual attitudes with opt-out allowed protected); *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970) (teacher cannot be dismissed for assigning story that could be construed as condoning killing the elderly and free sex, despite parental complaints); *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969) (teacher may not be punished for the content of his classroom discussions, including discussion of profane words, or his selection of materials for assignment, if he can demonstrate an educational purpose despite parental complaints); "People", *Education Week*, December 9, 1987, at 3 (elementary school principal's proposal to boost student performance by playing subliminal messages over the public-address system dropped after parental objection).

Assuming, as *amici* do, that parents do not have a constitutional right to ask a court to bar the general use of curricular material that is facially neutral *vis a vis* various religions, and given the academic freedom of teachers to use controversial material in the classroom, the right of exemption becomes a safety valve for avoiding divisive battles for control of public education. This is particularly true in this case, where the record shows that accommodation of these parents and their children worked before the school board adopted its "get tough" policy.

While asserting a compelling state interest in teaching tolerance of all religious views, the school officials have failed to exhibit tolerance in their own classrooms, overreacting instead with a heavyhandedness that violates the core constitutional values of free exercise of religion, individual autonomy in the intellect and spirit, and the right of parents to protect the religious values of their children.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1100

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

BOB MOZERT, *et al.*,
Petitioners,
v.
HAWKINS COUNTY PUBLIC SCHOOLS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF RESPONDENTS HAWKINS COUNTY PUBLIC SCHOOLS *ET AL.* IN OPPOSITION

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January 29, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

1. Whether exposure to ideas offensive to petitioners' religious beliefs in the public school reading curriculum constitutes an impermissible burden under the Free Exercise clause of the First Amendment?

2. Whether the state's compelling interests in education can be achieved if it is required to exempt students who elect to attend public schools from the reading curriculum?

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BRIEF OF RESPONDENTS HAWKINS COUNTY PUBLIC SCHOOLS *ET AL.* IN OPPOSITION

Respondents Hawkins County Public Schools *et al.*[1] respectfully request that this Court deny the petition for a writ of certiorari filed herein on December 31, 1987, to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on Augsut 24, 1987.

STATEMENT OF THE CASE

This case involves the question whether public schools violate the Free Exercise rights of their students when they insist that those who choose to attend public school study the prescribed elementary school reading curriculum.

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[1] This Opposition is submitted on behalf of Hawkins County Public Schools, Doug Cloud, Conley E. Bailey, Larry Elkins, Harold E. Silvers, Jr., Archie MacMillan, Quentin Dykes, James Salley, Roy Lipe, Robert Cooper, and James Childress.

ing material that presents points of view with which the student may disagree.[8]

In contrast, the plaintiffs believe that the way to teach a child is by directing the child to accept a particular set of values. (TR 720-22). The plaintiffs object to their children being exposed to material in which moral dilemmas are posed and/or the child is encouraged to make his own judgments (TR 718-21), and they object "to teaching that does not define in Biblical terms what values the students should accept." (TR 721). They object, for example, to a teacher or story raising the question of whether lying is acceptable or unacceptable in a particular context and to stories that do not depict lying as resulting in punishment or other bad consequences.[9] The plaintiffs object to their children being exposed to the feelings, attitudes and values of other students, when the views expressed are contrary to the plaintiffs' views. (9a). As described below, they object to their children being exposed to views on many controversial issues unless their views are endorsed as the correct ones. An expert on the teaching of critical reading, who was familiar with the plaintiffs' objections, concluded that "it would be almost impossible" to teach "critical reading consistent with the plaintiffs' religious objections." (TR 1465).

The plaintiffs' objections are inconsistent with a variety of other goals of the public schools' reading program. Tennessee public schools expose students in the reading program to the beliefs and practices of a broad range of other religious groups and to portrayals of women in non-stereotypical roles in order to encourage religious and gender tolerance. (TR 1221, 1344). The plaintiffs object to materials "that expose their children to other forms of

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[8] TR 1466-68 (Dr. Roger Farr, defendants' reading expert).

[9] Ex. 30 at 5-6; TR 122-23, 131, 137.

religion and to the feelings, attitudes and values of other students that contradict the plaintiffs' religious views without a statement that the other views are incorrect and that the plaintiffs' views are the correct ones." (8a-9a). They also object to repeated portrayals of women in non-traditional roles. (12a, 62a).

In order to enable students to develop as citizens able to understand and to take positions on issues, the public schools expose students to a variety of controversial issues that they may encounter as adults. (TR 1139-40, 1181, 1265-66). The plaintiffs object to the exposure of their children to many controversial issues in the reading curriculum, unless the students are instructed that their own views are the correct ones. With respect to some issues, the plaintiffs' view is that "there would be 'no way' certain themes could be presented without violating [their] religious beliefs," (12a-13a). Thus, the plaintiffs object to material which they view as critical of the free enterprise system, the military, law enforcement, and to discussions of endangered species, disarmament, gun control, abortion, "planetary problems of pollution, world population, hunger, a [need for] conservation of resources," (TR 85-6, 89) and the future of the human race.[10]

While the plaintiffs' religious views affect virtually all aspects of their lives,[11] in other areas, the plaintiff-parents do not attempt to shield the plaintiff-students from the themes to which they object in the reading curriculum. The plaintiffs have not objected to the material taught in subjects other than reading, despite the fact

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[10] Exs. 36, 43; TR 277-78, 358, 362. The plaintiffs have also objected to the schools efforts to teach them about such contemporary family problems as divorce, death, and suicide, to their children's exposure to stories in which magic is involved and to the schools' attempt to introduce them in the reading program to science education, for example, by teaching them about evolution. (13a).

[11] *See supra* at 2.

that many of the same themes to which they object in the reading curriculum are found in the other subjects. (67a). Moreover, the plaintiff-students are exposed to many of the same themes which plaintiffs find objectionable in the reading curriculum in the course of listening to radio and television, in attending movies, in reading newspapers and magazines, and in interacting with other residents of Hawkins County who do not share their religious views. (TR 432, 640, 736-38, 749, 898, 989). Plaintiffs desire that their children participate in the general life of the community both as children and as adults. (18a).

B. Background to This Controversy.

After the plaintiff-parents began to review the reading textbooks, they decided that they did not want their children reading the material that they objected to, and that they did not want them present in the classroom when the material to which they objected was read aloud or discussed by any other student. (4a). School officials insisted that plaintiffs' children participate in the reading program. However, at various times during the fall of 1983, eight of the plaintiff-students were provided with alternative textbooks and alternative reading arrangements. The textbooks used were older, outdated books. The alternative arrangements involved sending the plaintiff-students to the cafeteria, library or to a separate room and giving them a reading assignment associated with the alternative book. They were provided with no other reading instruction. They had no opportunity to discuss their assignments with the teacher or fellow students.[12] This alternative was characterized by an expert educator at trial as an "abdication" of the schools' responsibility to teach reading. (TR 1470).

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[12] Amended Joint Stipulation of Uncontested Facts, July 10, 1986, ¶¶ 39-41; TR 233-36, 447, 449.

In November 1983, the Hawkins County School Board rejected these alternative arrangements and adopted a resolution requiring that the Holt textbooks be used as the regular classroom textbooks. (4a). The plaintiff-students were suspended for failure to participate in the reading curriculum. (4a). Since December 1983, most of the plaintiff-students have either been enrolled in religious schools or been taught at home, and many planned to continue to do so even if they prevailed in this litigation. (TR 380-83, 662, 877-78, 966, 972, 985).

C. The History of This Proceeding.

On December 2, 1983, the plaintiffs filed this suit against the Hawkins County Public Schools and school officials, asserting that exposure of the plaintiff-students to the objectionable material violated their constitutional right to freely exercise their religion. (5a). They sought injunctive relief and damages. (55a).

The complaint was initially dismissed in the District Court,[13] but the Sixth Circuit reversed and remanded for a trial on the merits, concluding that there were disputed issues of fact relating to the issues of burden, compelling state interest and the existence of less restrictive alternatives that made summary judgment inappropriate. The Court "express[ed] no opinion on the merits of plaintiffs' claims or those of the defendants . . . ."[14] Following remand, the Tennessee Commissioner of Education intervened in support of defendants. (6a). Defendants stipulated that the plaintiffs' religious beliefs were sincere, and that the material offended plaintiffs' religious beliefs, but they declined to stipulate that plain-

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[13] *Mozert v. Hawkins County Pub. Schools*, 582 F. Supp. 201, 203 (E.D. Tenn. 1984) (83a-86a); *see also Mozert v. Hawkins County Pub. Schools*, 579 F. Supp. 1051 (E.D. Tenn. 1984). (87a-90a).

[14] *Mozert v. Hawkins County Pub. Schools*, 765 F.2d 75, 79 (6th Cir. 1985). (75a-81a) (81a).

tiffs' religious beliefs were burdened by exposure to the material. (6a).

At trial, it became clear that the public schools required only that the plaintiff-students be exposed to the material in question and that they were not required to believe it. (22a, 35a). Defendants' witnesses demonstrated the importance of learning to read critically both for future effectiveness in dealing with modern life and for success in the other curricular subjects, and the importance of the goals of the reading curriculum.[15]

These witnesses detailed the disruption that would result if plaintiffs were excluded from the reading curriculum but continued to participate in other subjects. Because the school curriculum is integrated, if the plaintiff-students did not participate in the reading program, they would fail to develop skills and cover materials that are essential to the other subjects, but that are taught as part of the reading program. (TR 1268-69). Excusing the children when material to which they objected was taught would be particularly disruptive in grades 1-4, where reading is not a separate subject, but is taught throughout the school day. (3a).

It was also demonstrated that permitting students to be excused from a core curriculum subject because they found the activities of the majority of students to be religiously offensive would introduce an element of religious divisiveness into the public schools that would be antithetical to their historic role of promoting tolerance. This would be harmful to both the students who are excused and to those who remain in the classroom.[16]

It was shown that if plaintiffs were permitted to be excused from a core curricular subject, then others would

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[15] *See supra,* Part A.

[16] TR 1604-06, 1613-15, 1629. (Testimony of Dr. Robert Coles, professor of child psychiatry at Harvard University.)

demand the right to be excused from aspects of the public school curriculum to which they object, and the result would likely be a flood of demands for exemption, which would be extremely disruptive to the public school system. (TR 1161).

For the most part, plaintiffs presented no evidence on these issues. Indeed, plaintiffs' experts were unfamiliar with plaintiffs' objections except in the most general sense. (TR 846, 851-52, 912, 1032-34, 1056).

Following the trial, the District Court held that the Hawkins County Public Schools were required to permit the plaintiff-students "to attend the Hawkins County public schools without participating in the course of reading instruction. . . ." (71a). On December 18, 1986, after a further hearing, the District Court awarded the plaintiffs $51,531 primarily as reimbursement for the expenses that they incurred in sending their children to Christian schools.[17]

On August 24, 1987, the Court of Appeals unanimously reversed. In an opinion by Chief Judge Lively, the Court of Appeals concluded that "exposure to objectionable material" (11a) was the crux of the plaintiffs' complaint, and that "there was no proof that any plaintiff student was ever called upon to say or do anything that required the student to affirm or deny a religious belief or to engage or refrain from engaging in any act either required or forbidden by the student's religious convictions." (11a). The Court of Appeals then held

> "that the requirement that public school students study a basal reader series chosen by the school authorities does not create an unconstitutional burden under the Free Exercise Clause when the stu-

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[17] *See* "Memorandum and Orders," Dec. 18, 1986 (49a-53a); "Order," Jan. 7, 1987 (48a). The individual school officials were held immune from damages liability because the Court viewed the law as unsettled at the time of the actions in question. (72a).

dents are not required to affirm or deny a belief or engage or refrain from engaging in a practice prohibited or required by their religion." (24a).[18]

Having found that plaintiffs' Free Exercise rights were not burdened, the Court of Appeals found it unnecessary to reach other issues. (23a). However, Judge Kennedy, while joining the majority, wrote a concurring opinion in which she concluded that even if there had been a burden, it was simply justified by compelling state interests, and that there was no less restrictive alternative to achieve these interests. (25a-30a). Judge Boggs concurred on other grounds. (31a-47a). On October 5, 1987, the Court denied rehearing and declined a suggestion for rehearing *en banc*, with "no judge of this Court having requested a vote on the suggestion. . . ." [19]

ARGUMENT

CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION BELOW IS CONSISTENT WITH DECISIONS OF THIS COURT, AND THE COURT OF APPEALS DECISION CONSTITUTES AN UNEXCEPTIONAL APPLICATION OF WELL ESTABLISHED PRINCIPLES.

I. THERE IS NO CONFLICT.

The Free Exercise clause protects individuals against governmental actions which place a burden on their ability to freely practice sincerely held religious beliefs. While both direct and indirect burdens qualify under the clause, it is clear that for a burden to exist, it must be substantial. As this Court has made clear, a burden exists in the constitutional sense only if the law involves a "grave interference" with religious tenets. *See Wis-*

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[18] Contrary to plaintiffs' suggestion (Pet. at 22-23), the Court did not hold that plaintiffs' beliefs were not offended by the material. (6a). Indeed, that was stipulated by the parties. *See supra* at 7-8.

[19] "Order," Oct. 5, 1987. (1a).

consin v. Yoder, 406 U.S. 205, 218 (1972). If a plaintiff can demonstrate burden, "[t]he state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest." *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981). In this case, the Court of Appeals reached only the first question, and, finding no unconstitutional burden, rejected plaintiffs' claim.

Contrary to plaintiffs' assertion, the Court of Appeals decision presents no conflict with any decision of this Court or any other court of appeals. This is not a case like *Pierce*[20] in which plaintiffs are being compelled to send their children to the public schools. Nor does this case involve compulsion to affirm a belief, as for example, in *Barnette*,[21] where students were compelled to "declare a belief" by saluting the flag, or as in *Torcaso*,[22] where individuals were required to declare a belief in God as a qualification for public office. And this case does not involve compulsion to engage in an activity that was proscribed by one's religion such as working on the Sabbath (*Sherbert*[23] and *Hobbie*[24]) or in an armaments factory (*Thomas*),[25] which in other cases was made a prerequisite to the receipt of a valued governmental benefit.[26]

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[20] *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

[21] *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631 (1943).

[22] *Torcaso v. Watkins*, 367 U.S. 488 (1961).

[23] *Sherbert v. Verner*, 374 U.S. 398 (1963).

[24] *Hobbie v. Unemployment Appeals Comm'n*, 107 S. Ct. 1046 (1987).

[25] *Thomas v. Review Bd.*, 450 U.S. 707 (1981).

[26] *See also Spence v. Bailey*, 465 F.2d 797 (6th Cir. 1972) (compulsory participation in military training burdens Free Exercise rights).

This case, however, involves no such infringement. As the District Court stated, the plaintiffs in this case object to allowing "their children to be exposed to the content of the Holt series." (62a). Similarly, the Court of Appeals concluded that all that was required "was reading and discussing the material in the Holt series, and hearing other students' interpretations of those materials." (22a) As the Court of Appeals pointed out, neither the holdings nor the language of this Court's decisions suggest that exposure to ideas constitutes a burden on Free Exercise rights.[27] (13a-19a).

The decision of this Court in *Wisconsin v. Yoder* makes clear that, ordinarily, objections to exposure to the public school curriculum present no grounds for a Free Exercise claim. As the Court of Appeals noted, "*Yoder* rested on . . . a singular set of facts . . . ." (17a). In *Yoder*, unlike the plaintiffs here, the Old Order Amish "separate[d] themselves from the world and avoid[ed] assimilation into society, and attempt[ed] to shield their children from all worldly influences." (17a).[28] While not objecting to participation in the public elementary school curriculum, they believed that "their children's attendance at high school, public or private, was contrary to the Amish religion and way of life." 406 U.S. at 209. They objected to their children being taken "away from their community, physically and

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[27] It is noteworthy that none of this Court's decisions suggested that exposure would give rise to a Free Exercise claim. *See Barnette* (no claim that exposure to other children saluting the flag burdened Free Exercise rights); *Thomas* (no claim that exposure to others engaging in armaments production burdened Free Exercise rights).

[28] The plaintiffs here have not formed a separate religious community, and the plaintiff-students are exposed to many of the same themes that they object to in the reading curriculum in the other areas of the curriculum, and in their lives outside of school. *See supra* at 5-6. As the Court of Appeals stated, unlike the Amish in *Yoder*, "the parents in the present case want their children to acquire all the skills required to live in modern society." (18a).

emotionally, during the crucial and formative adolescent period of life." 406 U.S. at 211. As a result of these unique circumstances, the Court concluded that the Old Order Amish had demonstrated the existence of a burden on their Free Exercise rights—"one that probably few other religious groups or sects could make. . . ." 406 U.S. at 236. The *Yoder* case makes quite clear that objections such as those presented here do not rise to the level of a Free Exercise violation.[29]

Nonetheless, plaintiffs suggest that the Court of Appeals decision is inconsistent with decisions of other courts of appeals. In fact, the only decision of another circuit even alleged to be inconsistent with the Court of Appeals decision is the decision of the Eighth Circuit in *Florey v. Sioux Falls School District 49-5*, 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980).[30]

In *Florey*, parents objected to School Board rules which permitted the observance of holidays having "both a religious *and* a secular basis;" provided that music, art, literature and drama having a religious theme could be

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[29] *See also Duro v. District Attorney*, 712 F.2d 96, 97 (4th Cir. 1983) (distinguishing *Yoder* on similar grounds). Plaintiffs also rely on *Edwards v. Aquillard*, 107 S. Ct. 2573 (1987) and *Wallace v. Jaffree*, 472 U.S. 38 (1985). Pet. at 14-15. Both of these were Establishment clause cases, and neither stands for the proposition that Free Exercise rights are burdened by exposure to wholly secular material.

[30] Plaintiffs also claim that the Court of Appeals decision is inconsistent with the concurring opinion of a single judge in *Grove v. Mead School District No. 354*, 753 F.2d 1528 (9th Cir.), *cert. denied*, 106 S. Ct. 85 (1985). The alleged inconsistency with the concurring opinion provides no ground for certiorari. In any event, that opinion only acknowledged that a claim similar to that raised by the plaintiffs here "would *probably* be sufficient to present a free exercise *question*. . . ." 753 F.2d at 1542 (Canby, J., concurring) (emphasis added). As the Court of Appeals here recognized, this hardly amounts to disagreement with its ruling in this case. (19a-20a).

included in the curriculum, as long as it was presented in an objective manner; and allowed for the use of religious symbols as a teaching aid, if such symbols were displayed as an example of cultural and religious heritage. 619 F.2d at 1314. The rules provided that "students and staff members should be excused from participating in *practices* which are contrary to their religious beliefs unless there are clear issues of overriding concern that would prevent it." 619 F.2d at 1317 n.6 (emphasis added). The Eighth Circuit considered the validity of these rules on their face, and held that the rules did not violate the Establishment clause. Plaintiffs had added a Free Exercise claim as an "apparent afterthought" in the Court of Appeals. *Id.* at 1318 n.7. The court's holding with respect to that claim is not contrary to, and in fact directly supports, the Court of Appeals decision in this case. The court concluded that excusing the students from "participat[ion] in practices," such as the Christmas assembly,[31] was sufficient to obviate any Free Exercise claim, and held that the "public schools are not required to delete from the curriculum all materials that may offend any religious sensibility." *Id.* at 1318.[32]

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[31] As petitioners' concede (p. 19), apparently the rules were designed to excuse students from such assembly activities as singing Christmas carols. 619 F.2d at 1317 & n.6.

[32] Plaintiffs also assert that the decision below is inconsistent with two district court decisions. Not only is this not a ground for certiorari, but the decisions in fact are not inconsistent. In *Moody v. Cronin*, 484 F. Supp. 270, 271 (C.D. Ill. 1979), the plaintiffs did not object to being exposed to ideas, but to participating in activities with members of the opposite sex in which both they, and the other students, would be wearing "immodest apparel"—an activity explicitly prohibited by their religious beliefs.

In *Wright v. Houston Independent School District*, 366 F. Supp. 1208 (S.D. Tex. 1972), *aff'd per curiam*, 486 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974), the District Court did not hold that excusing children from the teaching of evolution was con-

In fact, the Court of Appeals decision is consistent with every decision of the lower federal and state courts of which we are aware that has considered claims similar to those of the plaintiffs. In *Duro v. District Attorney, Second Judicial District of North Carolina*, 712 F.2d 96, 97 (4th Cir. 1983), the Fourth Circuit held that the Free Exercise clause was not violated when North Carolina required the plaintiff's children to attend public or private school, despite Duro's religious objection to exposing his children "to others who do not share his religious beliefs. . . ." In *Williams v. Board of Education*, 388 F. Supp. 93, 96 (S.D. W. Va.), *aff'd*, 530 F.2d 972 (4th Cir. 1975), the Free Exercise claims of parents who objected to exposure of their children to a series of textbooks and supplemental materials were rejected, and in *Davis v. Page*, 385 F. Supp. 395 (D.N.H. 1974), the Free Exercise claims of parents who objected to their children's participation in music and health classes and

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stitutionally required, noting only that the parents should determine whether the school would permit an opt out.

Plaintiffs state that "[s]tate appellate courts have resolved parental challenges to sex education curricula, by recognizing the right of religious dissenters to opt out of sex education classes." (Pet. at 21 n.8.) In fact, in four of the five cases cited by plaintiffs, the schools permitted any objecting parent to have his child opt out of the curricular material that was deemed to be objectionable, and thus the courts were not confronted with the question of whether a student's Free Exercise rights were burdened by compulsory exposure to ideas that were deemed to be objectionable. *See Smith v. Ricci*, 89 N.J. 514, 446 A.2d 501, 505 (1982); *Medeiros v. Kiyosaki*, 52 Haw. 436, 478 P.2d 314, 317-18 (1970); *Citizens for Parental Rights v. San Mateo County Bd. of Educ.*, 51 Cal. App. 3d 1, 124 Cal. Rptr. 68, 83 (1985); *Hobolth v. Greenway*, 52 Mich. App. 682, 218 N.W.2d 98, 99 (1974). In the fifth case, *Valent v. New Jersey State Bd. of Educ.*, 114 N.J. Super. 63, 274 A.2d 832 (1971), the Superior Court of New Jersey denied a motion for summary judgment on the grounds that the issue of whether public schools could require students to participate in a sex education course presented an issue warranting a trial.

As Judge Kennedy's opinion also recognizes, "[t]he state and the Hawkins County School Board also have a compelling interest in avoiding disruption in the classroom." (27a). The Hawkins County Schools utilize an integrated curriculum—the skills and values developed in one subject are reinforced in another. This is particularly true in grades 1-4 where reading is taught throughout the day, rather than in a particular identified period. (3a). Thus, if a student does not participate in the reading curriculum, he will not learn skills that are essential to and part of the other subjects. Moreover, in teaching these other objects, the teachers will continually be confronted with the choice of taking time out to explain to the student what he has missed as a result of his absence from the reading class, thereby disrupting the lesson for the other students, or of having the objecting student miss the point of the lesson entirely.

In addition, as also noted in Judge Kennedy's opinion, "Hawkins County Public Schools have a compelling interest in avoiding religious divisiveness." (28a). Traditionally, one of the most important roles that public education has played has been to cement together the varied, often opposing elements in our society.[36] permitting certain students to opt out of a core part of the public school curriculum, while still participating in other parts of the curriculum because they have religious objections to what the other students are doing, would be directly antithetical to this objective. Indeed, courts have long been concerned with avoiding such division in our public schools. As Justice Frankfurter stated in *McCollum v. Board of Education*, 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring), "[i]n no activity of the State is it more vital to keep out divisive forces than in its schools. . . ."

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[36] *McCollum v. Board of Educ.*, 333 U.S. 203, 216 (1948) (Frankfurter, J., concurring).

Finally, as Judge Kennedy recognized, if the plaintiffs were to prevail in this case, it "would create a precedent for persons from other religions to request exemptions from core subjects because of a religious objections." (29a). If the plaintiffs were to prevail in this case, classroom teachers, school officials and textbook publishers would all seek to avoid the inclusion of potentially controversial material in the public school curriculum in order to avoid the risk of injunctive and damage relief. (TR 1238-39, 1473-74, 1513-14). This will magnify the adverse impact of the District Court decision and threaten the public schools generally.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

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January 29, 1988

Supreme Court, U.S.
FILED
FEB 3 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1100

In The
Supreme Court of the United States
October Term, 1987

BOB MOZERT, *et al.*,

Petitioners,

vs.

HAWKINS COUNTY PUBLIC SCHOOLS, *et al.*,

Respondents.

BRIEF OF THE COMMISSIONER OF EDUCATION OF TENNESSEE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether exposure to ideas offensive to petitioners' religious beliefs in the public school reading curriculum constitutes an impermissible burden under the free exercise clause of the First Amendment?

2. Whether the State's compelling interest in education can be achieved if it is required to exempt students who elect to attend public school from the reading curriculum?

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No. 87-1100

In The
Supreme Court of the United States
October Term, 1987

BOB MOZERT, *et al.*,

Petitioners,

vs.

HAWKINS COUNTY PUBLIC SCHOOLS, *et al.*,

Respondents.

BRIEF OF THE COMMISSIONER OF EDUCATION OF TENNESSEE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The respondent, Charles E. Smith,[1] Commissioner of Education of the State of Tennessee, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Sixth Circuit's opinion in this case. That opinion is reported at 827 F.2d 1058 (6th Cir. 1987).

[1] Pursuant to Rule 40.3 of the Supreme Court Rules, Charles E. Smith has been substituted for Robert L. McElrath as Commissioner of Education for the State of Tennessee as a result of Dr. McElrath's resignation and Dr. Smith's appointment effective January 17, 1987.

STATEMENT OF THE CASE

The Commissioner adopts the statement of facts as presented in the opinion of the Court of Appeals, below, along with the statement of facts presented by the respondents, Hawkins County Public Schools, *et al.*, in their brief in opposition to the petition for writ of certiorari. Taken together, these statements fully and fairly summarize the facts in this case. *See Mozert v. Hawkins County Public Schools*, 827 F.2d at 1059-63; *Brief of Hawkins County Public Schools in Opposition to Petition for Writ of Certiorari*, pp. 1-10.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE QUESTIONS PRESENTED BY THE PETITIONERS REGARDING THEIR FREE EXERCISE OF RELIGION IN THE PUBLIC SCHOOL CONTEXT HAVE ALREADY BEEN RESOLVED BY THIS COURT AND OTHER LOWER COURTS IN FAVOR OF THE RESPONDENTS AND, ACCORDINGLY, DO NOT MERIT REVIEW BY THIS COURT.

The fact that the judgment of the Court of Appeals, below, is correct is sufficient in and of itself for this Court to deny the petition for writ of certiorari.[2] There are two

[2] Where the decision of a lower court is correctly decided based on the prior precedent of this Court, then the questions raised in a petition for writ of certiorari do not constitute "important question[s] of federal law which [have] not been, but should be, settled by this Court . . . .". Rule 17.1(c), Supreme Court Rules. Of course, the fact that a particular case has received national press attention has no bearing on whether that case merits review by this Court.

grounds[3] upon which the correctness of the judgment of the Court of Appeals may rest: (1) Exposure to ideas which are offensive to the petitioners' religious beliefs as part of the public school reading curriculum is not a burden on their free exercise of religion; (2) The State's compelling interest in public education through a uniform integrated curriculum of which reading is an essential part cannot be achieved by permitting the petitioners to be excused on religious grounds from the public school reading program.[4]

As for the first ground, this Court has never held that where the State exposes a person to ideas which offend his or her religious beliefs, such an exposure constitutes a burden on that person's free exercise of religion. Such a view is totally unrealistic and contrary to our pluralistic society. Moreover, it inhibits the primary goals of public education to expose children to the diverse world about which they are to enter. It is a well established principle

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[3] Rule 22.1 of the Supreme Court Rules provides that respondents in opposing a petition for writ of certiorari may raise "any matter or ground why the cause should not be reviewed by this Court." Although Chief Judge Pierce Lively in the opinion of the Court of Appeals, below, did not reach the question of whether the State's compelling interest in public education could be accomplished under a partial home school reading program, that issue was addressed in favor of the respondents by Judge Cornelia Kennedy in her concurring opinion. *Mozert v. Hawkins County Public Schools*, 827 F.2d at 1070.

[4] The petitioners argue that permitting their children to participate in a partial home school option by learning to read at home instead of through the public school reading program would "be able to meet the state's objectives . . ." *Petitioners' Brief in Support of Petition for Writ of Certiorari*, p. 17. Such an argument is incorrect because it ignores the catastrophic effects such an alternative would have on the public education system. *See, infra*, pp. 6-12.

through the decisions of this Court that in order to burden a person's free exercise of religion, government action must either: (1) coerce a person to affirm a belief repugnant to their religion; or (2) interfere either directly or indirectly with a religious practice of a person. *See, Cantwell v. Connecticut,* 310 U.S. 296 at 303 (1940) (The free exercise clause embraces two concepts—the freedom to believe and the freedom to act); *Torcaso v. Watkins,* 367 U.S. 488 (1961) (The Maryland Constitution requirement of a declared belief in the existence of God as a test for office compels a person to affirm a belief repugnant to their religious beliefs); *Sherbert v. Verner,* 374 U.S. 398 (1963) (Denial of unemployment compensation benefits based on a person's refusal to alter her religious practices of not working on Saturday is an indirect burden on that religious practice.) The petitioners' exposure by the State to ideas which are offensive to the religious beliefs of the petitioners through the public school reading program neither requires the petitioners to affirm any particular belief repugnant to their religion nor interferes with any religious practice.

None of the cases cited by the petitioners hold that exposure to religiously offensive ideas constitutes a burden on a person's free exercise of religion. *See, West Virginia State Board of Education v. Barnette,* 319 U.S. 624 at 631 (1943) (This case concerned the fact that compelling students to declare a belief by requiring them to salute the flag is a burden. No claim was made by the plaintiffs that their children being exposed to other children saluting the flag constituted a burden.); *Sherbert v. Verner, supra,* (The plaintiff claimed that the denial of unemployment compensation benefits for failure to work on Saturday is

a burden upon her religious practice of not working on Saturday. She did not claim that being exposed to the view that others in the work force had no religious scruples against working on Saturday was a burden.); *Thomas v. Review Board,* 450 U.S. 707 (1981) (The plaintiff asserted that the denial of unemployment compensation for failure to work in an armaments factory likewise constitutes a burden on the practice of not engaging in acts which support war; however, no claim was made by the plaintiff that being exposed to government publications designed to encourage employees to produce armaments is a burden.)[5]

The petitioners also cite two recent establishment clause decisions of this Court which bear no relation to the question of whether exposure to religiously offensive ideas constitutes a burden under the free exercise clause. *See, Wallace v. Jaffree,* 472 U.S. 38 (1985) (The Alabama voluntary prayer statute was violative of the establishment clause as being religiously motivated without any secular purpose as opposed to any indication that any children's free exercise rights were burdened in that instance.); *Edwards v. Aguillard,* 107 S.Ct. 2573 (1987) (The Louisiana Creationism Act was also void of any secular purpose with no indication that there was any burden on the free exercise rights of any school children.)

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[5] In the opinion of the Court of Appeals, below, Chief Judge Lively stated that the "requirement that students read the assigned materials and attend classes, in the absence of a showing that this participation entailed affirmation or denial of their religious beliefs or performance or non-performance of their religious exercise or practice does not place an unconstitutional burden on the students' free exercise of religion." *Mozert v. Hawkins County Public Schools,* 827 F.2d at 1065.

There are also a number of additional lower court decisions which support the correctness of Chief Judge Lively's determination that exposure to ideas offensive to the religious beliefs of petitioners does not constitute a burden on those beliefs. *See Davis v. Page,* 385 F.Supp. 395 (D.N.H. 1974) (The fact that a health class is "distasteful" to the religious beliefs of the plaintiffs is insufficient to invoke the free exercise clause.); *Williams v. Board of Education,* 388 F.Supp. 93 (S.D. W.Va. 1975) (The First Amendment does not guarantee that nothing about religion will be taught in the schools nor that nothing offensive to any religion will be taught in schools.); *Fellowship Baptist Church v. Benton,* 620 F.Supp. 308 (S.D. Iowa 1985) (Education requirement does not deny free exercise where the individual is free to disagree with the contents). *See also Wilson v. Block,* 708 F.2d 735, 741 (D.C. Cir. 1983) (Many government actions may "offend religious believers, but unless such actions penalize faith they do not burden religion.")

Although this Court has never been presented with this precise factual situation, prior case law of this Court provides ample basis for the conclusion that the answer to the question of whether exposure constitutes a burden is well settled in favor of the respondents. Exposure to religiously offensive ideas does not compel a person to affirm a belief repugnant to his or her own, nor does it directly or indirectly interfere with a person's religious practices. Moreover, decisions of lower courts with facts very similar to the present confirm this conclusion. On that basis, this Court should deny review.

The second ground which supports the correctness of the judgment of the Court of Appeals, below, is the State's

compelling interest in public education relative to the petitioners' religious liberties. Even the petitioners concede that the State has a compelling interest in public education.[6] However, the petitioners misperceived the State's interest in public education by equating that interest to the State's interest in compulsory education for all students in Tennessee. *Mozert v. Hawkins County Public Schools,* 827 F.2d at 1201. It is true that the State of Tennessee has a substantial interest in mandating that every child in Tennessee receive a minimum level of education by compelling children to attend either public, private, church or home school from ages seven to sixteen. Tenn. Code Ann. § 49-6-3001(c)(1) (1987). However, this interest only goes as far as to require minimal functional literacy for children who attend private, church or home schools over which the State has virtually no control. The only state involvement in such programs is through occasional testing and other minimum requirements to assure that a child is receiving a basic education. Tenn. Code Ann. §§ 49-6-3001(c)(2) and 3050 (1987).

On the other hand, the State of Tennessee has made a decision to establish its own program for the education of

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[6] Throughout this litigation, the petitioners have conceded that the State has a compelling interest in public education. *See Mozert v. Hawkins County Public Schools,* 647 F.Supp. 1194 at 1200 (E.D. Tenn. 1987) (No party disputes that the State's interest in education is compelling, overriding, of the highest order, and especially important.) Moreover, the questions presented in the petition for writ of certiorari do not challenge the existence of a compelling state interest in public education, but rather argue that there is a less restrictive alternative to accomplishing that interest.

its future citizens. This Court has indicated that "[e]ducation is perhaps the most important function of state and local government . . . [and that] it is a principal interest in awakening the child to cultural values . . . and in helping him adjust normally to his environment." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). Likewise, this Court has more recently stated that "public education must prepare pupils for citizenship in the republic . . ." *Bethel School District v. Frazier*, 106 S.Ct. 3159, 3164 (1986). *See also Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979) (The objectives of public education are "the inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system.")

In Tennessee, the State has identified a number of goals for its students in public schools well above the minimum goal of literacy required of children in private, church and home schools. Some of these objectives include: (1) preparing each student to be a useful, thinking and discerning citizen; (2) developing good citizenship in Tennessee's young people; (3) enabling students to think critically and arrive at intelligent decisions by exposure to controversial topics;[7] and (4) helping students to identify their own values, not for the purpose of changing

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[7] At one point in this litigation, it was the petitioners' position that reading involves only the recognition of words with the objective of "good English and grammar". *Mozert v. Hawkins County Public Schools*, 827 F.2d at 1062. But, critical reading which is an essential element in enabling students to think critically and arrive at intelligent decisions is accomplished by exposing children to diverse and controversial subjects and problems. The discussion of these issues in the classroom transcends the Holt reading series and is an essential element of not only the reading program but the entire educational curriculum. *Id.* at 1072.

those values but to understand that values may differ among individuals. There is no doubt that the State of Tennessee has a compelling interest in achieving these goals. As Judge Kennedy stated in her concurring opinion in the Court of Appeals, below: "Teaching students about complex and controversial social and moral issues is just as essential for preparing public school students for citizenship and self government as inculcating in the students the habits of manners of civility." *Mozert v. Hawkins County Public Schools,* 827 F.2d at 1071. Thus, the law is settled that the State has a compelling interest in exposing children in public schools to controversial social and moral issues as an integral part of the learning process.

The petitioners claim that the Holt texts contain a number of themes offensive to their religious beliefs such as "occultism, secular humanism, evolution, passivism, feminism and disobedience to parents." *Petitioners' Brief in Support of Petition for Writ of Certiorari,* pp. 3-4. In addition, the petitioners argue that the State can achieve its compelling interest in public education by permitting their children to be excused from the public school reading program and learn reading at home instead. *Id.* at 17. This position ignores both the reality of the facts in this case and precedent of this Court relative to public education. If the State is required to shield the plaintiffs from being exposed to certain controversial ideas in the Holt texts which they find offensive to their beliefs, it will be unable to achieve its goals in public education relative to these children, i.e., enabling students to think critically and arrive at intelligent decisions by exposure to controversial topics.

More importantly, the petitioners' proposed arrangement creates a wholly untenable situation in the public school classroom. If a child has objections to certain themes as being religiously offensive in a reading text, the teacher will be placed in the impossible dilemma of insuring that this child is not exposed to these same themes in other subjects.[8] Such a situation places the teacher in the Hobson's choice of either: (1) removing the objecting child from the classroom when any materials offensive to that child's religious beliefs are discussed, or (2) prohibiting any discussion of these objectionable themes totally from the entire classroom day. Members of this Court have rejected both of these choices in looking at whether the State's compelling interest in public education can still be achieved if these alternatives are implemented.

In Justice Brennan's concurrence in *School District of Abbington v. Schempp,* 374 U.S. at 292, it was noted that "the exclusion of a pupil [from the classroom based upon religious beliefs] puts him in a class by himself; it subjects him to a religious stigma; and all because of his religious beliefs." Clearly excluding a child from a public school classroom based upon religious beliefs would create religious divisiveness in the public schools. In "no activity of the state is it more important to keep out divisive forces than in our schools." *Illinois ex rel. McCollum v. Board of Education,* 333 U.S. 203, 231 (1948) (Frankfurter, J. concurring). Not only would religious divisiveness occur in

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[8] Some of the petitioners objected to their children not only being required to read the Holt texts, but also objected to their children even being in the same classroom when these texts were read aloud. *Mozert v. Hawkins County Public Schools,* 827 F.2d at 1072, Fn. 3.

such a situation, but there would also be a significant material disruption of the educational process.[9]

As for prohibiting the discussion of themes which are offensive to the petitioners' religious beliefs, Justice Jackson in his concurring opinion in *Illinois ex rel. McCollum v. Board of Education,* 333 U.S. at 235 stated the following:

> Authorities list 256 separate and substantial religious bodies to exist in the continental United States. Each of them, through the suit of some discontented but unpenalized and untaxed representatives has as good a right as the plaintiff to demand the Court to compel the schools to sift out of their teaching everything inconsistent with its doctrines. If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant lawsuits.

Precedent of this Court refutes the plaintiffs' contention that permitting their children to be excused from the

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[9] The difficulties encountered in public schools would be enormous. The State of Tennessee requires the use of an integrated curriculum in which state objectives in one subject may be taught in another subject. For example, a reading group may learn certain science objectives about fossils through a story in the reading program. Permitting students to be taught reading at home while participating in other subjects would create serious problems with how to proceed with that child's educational progress. *Mozert v. Hawkins County Public Schools,* 827 F.2d at 1071-72. Moreover, by having no control over the reading program of the petitioners, a teacher would be unsure as to whether the petitioners had mastered certain reading skills which were essential in other subject areas for the child's education. This inability to comprehend other subject areas would cause additional disruption in the education of other children by slowing the process for the entire classroom. *Id.*

reading program and taught reading at home is a viable alternative which still achieves the State's compelling interest in public education. As Judge Kennedy in her concurring opinion in the Court of Appeals, below, stated: "If the school district were required to accommodate exceptions and permit other students to opt out of the reading program and other core courses with materials others found objectionable, this would result in a public school system impossible to administer." *Mozert v. Hawkins County Public Schools,* 827 F.2d at 1072-73.

Based upon the correctness of the judgment of the Court of Appeals, below, on either the burden or compelling interest questions, the Commissioner would urge this Court to deny the petition for writ of certiorari.

II.

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE COURT OF APPEALS, BELOW, AND OTHER CIRCUITS OR THE PRIOR DECISIONS OF THIS COURT.

The petitioners have failed to cite any decision of another circuit court of appeals which is in conflict with the Sixth Circuit decision in this case. Moreover, the opinion below is consistent with the reasoning of other circuits and this Court in resolution of controversies between public schools and religious believers.

In *Smith v. Board of School Commissioners of Mobile County,* 827 F.2d 684 (1987), the Court of Appeals for the Eleventh Circuit enumerated certain goals in public education very similar to those stated by Judge Kennedy in her concurring opinion including the teaching of values such as "independent thought, tolerance of diverse views,

self respect, maturity, self reliance, and logical decision making." *Id.* at 692. Textbook content was recognized as reflective of those secular ideals which were deemed appropriate for teaching to public school students. The Eleventh Circuit further concluded that the objecting parents and students who raised establishment clause objections to the secular content of the public school text books had failed to establish any free exercise claim even though the district court found that the students' religious beliefs would likely be affected by the content of the books. *Id.* at 692, fn. 12.

Likewise, the Court of Appeals for the Fourth Circuit has rejected arguments that the free exercise of religion is inhibited by public school use of textbooks which may be religiously offensive to some individuals, *Williams v. Board of Education,* 388 F.Supp. 93 (S.D. W.Va.), *aff'd,* 530 F.2d 972 (4th Cir. 1975) and that exposure of students to other students who do not share the same religious beliefs interferes with the free exercise of religion, *Duro v. District Attorney, Second Judicial District of North Carolina,* 712 F.2d 96 (4th Cir. 1983)

In *Florey v. Sioux Falls School District,* 619 F.2d 1311 (8th Cir. 1980) *cert. denied* 449 U.S. 987 (1980), which was cited by the petitioners as a conflicting decision, the Court of Appeals for the Eighth Circuit acknowledged that matters of cultural significance, including matters having additional religious significance, are appropriate for inclusion in the public school curriculum. The primary complaint of the *Florey* plaintiffs with regard to a school district policy on secular/religious holidays was that it authorized "something more than secular study" in violation

of the establishment clause. *Id.* at 1316. Thus, the Eighth Circuit did not address any exposure issue such as is presented by petitioners in the present case. The court's brief discussion of free exercise does not imply recognition of any right not to be exposed to information contained in a secular curriculum.[10]

In their attempt to portray a circuit conflict, the petitioners are misplaced in relying on a concurring opinion in *Grove v. Mead School District, No. 353,* 753 F.2d 1528 (9th Cir. 1985), *cert. denied* 106 S.Ct. 85 (1986). The majority opinions in *Grove* and *Mozert* address different species of the First Amendment issues, the Ninth Circuit not having been presented with any clear free exercise claim. Thus, the opportunity for a conflict is absent. The *Grove* concurring opinion is, in fact, in accord with the *Mozert* opinion as explained by Chief Judge Lively in the opinion below. *Mozert v. Hawkins County Public Schools,* 827 F.2d at 1068.

Similarly misplaced is the petitioners' reliance upon decisions of lower federal courts,[11] and state courts in an effort to contrive a conflict among the circuit courts of appeal. First, such lower court cases are not indicative

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[10] To the contrary, in discussing accommodation of religious objections, the court in *Florey* states that it would be "literally impossible to develop a public school curriculum that did not in some way affect the religious or nonreligious sensibilities of some of the students or their parents" and that schools "need not and should not sacrifice the quality of the students' education" in order to avoid conflicts. *Florey v. Sioux Falls School District,* 619 F.2d at 1317.

[11] In particular, the petitioners rely on *Moody v. Cronin,* 484 F.Supp. 270 (C.D. Ill. 1979); *Wright v. Houston Independent School District,* 366 F.Supp. 1208 (S.D. Tex. 1972).

of a conflict among appellate courts which would warrant this Court's examination. Additionally, the petitioners misapprehend the holdings of such cases as establishing a constitutional right of students to "opt out" of learning the core academic curriculum while simultaneously remaining in the public schools. While it has not been uncommon for students to be excused from matters peripheral to the core academic curriculum, the cases cited establish no precedent for vesting public school students with a constitutional right to delete the reading curriculum from their public school experience.

The opinion of the Sixth Circuit in *Spence v. Bailey*, 465 F.2d 797 (6th Cir. 1972) is in accord with its holding in the instant case. The petitioners' suggestion for a rehearing *en banc* afforded the Sixth Circuit an opportunity to correct any inconsistencies between the opinion below and established First Amendment law. However, the suggestion of rehearing was unamimously rejected by the full panel. *Petitioners' Brief in Support of Petition for Writ of Certiorari*, p. 1a (appendix).

The requirement that public school students be exposed to ideas which might offend their religious beliefs through reading a basal reader series chosen by school authorities does not constitute coercion under the free exercise clause. This conclusion by the Court of Appeals, below, is consistent with this Court's holdings in *Barnette*, *Sherbert*, and *Thomas*. *See* arguments, *supra*, pp. 4-5. As for *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court of Appeals correctly distinguished *Yoder* in that total removal of their children from the "worldly influence" of public education, which was sought by Amish parents in that case, has always been available to petitioners through

the private school or home school options. *Mozert v. Hawkins County Public Schools,* 827 F.2d at 1067. Finally, it should be noted that this Court refused to consider a claim by certain parents in Virginia that the compulsory attendance laws of that state violated their free exercise rights on the grounds that the curriculum in both private and public schools was contrary to their religion. *Snider v. Virginia,* 106 S.Ct. 2911 (1986) (dismissed for want of a substantial federal question).

Since there is no conflict between the decision of the Court of Appeals, below, and prior decisions of this Court and other Courts of Appeal, the petition for writ of certiorari should be denied.

CONCLUSION

Based upon the foregoing authorities and analyses, the respondent, Commissioner Charles E. Smith, respectfully requests this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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